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Maintaining Residential Integration: Municipal Practices and Law

Kermit J. Lind

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MAINTAINING RESIDENTIAL INTEGRATION: MUNICIPAL PRACTICES AND LAW

KERMIT J. LIND*

I. INTRODUCTION	603
II. BACKGROUND	606
III. LEGAL FRAMEWORK	611
A. <i>Civil Rights Act of 1866</i>	612
B. <i>Title VIII</i>	613
C. <i>The Constitution</i>	620
IV. POLICIES AND PROGRAMS	629
A. <i>Knowledge of Conditions and Changes</i>	630
B. <i>Local Legislation and Policy Statements</i>	633
C. <i>Controlling Unfavorable Real Estate Practices</i>	635
D. <i>Affirmative Action Strategies</i>	638
E. <i>Undergirding the Quality of Life</i>	643
F. <i>The Metropolitan Alliance</i>	644
V. CONCLUSION	645

I. INTRODUCTION

THE 1980 CENSUS CONFIRMED that while both black and white suburban populations grew during the 1970's, the black suburban population grew at a more rapid rate than the white suburban population. More than one-fifth of the nation's black population now lives in suburbs.¹ Nevertheless, black households appear in only a limited number of suburbs because black selection of suburban locations has been severely restricted. In the urban areas of mid-west and plains states, for example, only 26% of the suburban municipalities have populations more than 1% black.²

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¹ Long and DeAre, *The Suburbanization of Blacks*, AMERICAN DEMOGRAPHICS, Sept., 1981, at 16. A useful summary of recent residential segregation studies is found in Roof, *Race and Residence: The Shifting Basis of American Race Relations*, 441 Annals 1 (1979). See also R. LAKE, THE NEW SUBURBANITES: RACE AND HOUSING IN THE SUBURBS 3-73 (1981).

² Memorandum on percent of black population in 43 metropolitan areas as reported in the 1980 census prepared by Dr. H. Richard Obermanns for the Cuyahoga Plan of Ohio, Inc. (1981) (on file with author).

The vast majority of the nation's suburbs remain racially exclusive.³ Suburbs that are not racially exclusive and which include a statistically significant black or minority population are generally found adjacent to black ghettos and are expected to become part of those ghettos while other suburbs are in well-defined patterns of white flight and are also potential candidates for resegregation.

During the last decade some of the municipal governments in racially diverse suburban communities undertook to preserve their residential integration.⁴ They adopted public policies favoring racial diversity and they recognized that deliberate effort was necessary to prevent racially diverse neighborhoods from resegregating. These efforts by suburban municipalities to promote and protect interracial housing patterns have been challenged by the organized real estate sales industry⁵ and, in one or two instances, by minority interest groups.⁶ The industry's spokesmen claim that municipal attempts to preserve residential integration from segregated housing market conditions and discriminatory real estate practices violate fair housing laws and the United States Constitution.⁷ Early attacks focused on specific municipal prohibitions against unfavorable real estate practices such as "for sale" sign bans and anti-solicitation ordinances.⁸ Current litigation against the city of Cleveland Heights, Ohio,

³ Lake, *The Fair Housing Act in a Discriminatory Market: The Persisting Dilemma*, AM. PLAN. A.J., Jan. 1981, at 48.

⁴ K. WILLIAMS, D. DEMARCO AND D. ONDERDONK, AFFIRMATIVE ACTION IN HOUSING—AN EMERGING PUBLIC ISSUE, Institute for Public Policy and Administration, Governors State University, Park Forest South, Illinois (this paper was published and informally distributed in 1980, according to one of its authors) [hereinafter cited as AFFIRMATIVE ACTION IN HOUSING]. See also H. OBERMANN, STABILITY AND CHANGE IN RACIALLY DIVERSE SUBURBS, 1970-78, Heights Community Congress, Cleveland Heights, Ohio (1980) (this study describes racially diverse suburbs in mid-western communities, especially in Ohio, Michigan and Illinois) [hereinafter cited as H. OBERMANN, STABILITY AND CHANGE].

⁵ See *Illinois Assoc. of Realtors v. Village of Bellwood*, 516 F. Supp. 1067 (N.D. Ill. 1981) and *Smith v. City of Cleveland Heights* C 80-1695 (N.D. Ohio, filed Sept. 12, 1980). The Sun Press (Beachwood, Ohio), Jan. 21, 1982 at 1, col. 6 reports that the National Association of Realtors is using the *Smith* lawsuit to challenge "affirmative steering" and integration maintenance programs. See also Hayes, *Managed Integration*, BLACK ENTERPRISE, July 1982, at 43-46 [hereinafter cited as Hayes, *Managed Integration*].

⁶ BUSINESS AND PROFESSIONAL PEOPLE FOR PUBLIC INTEREST (a Chicago Public Interest Law Firm), MAINTENANCE OF RACIAL RESIDENTIAL DIVERSITY, April, 1981, at 6 (this report to the Joyce Foundation in Chicago, Illinois gives a brief description of arguments against integration maintenance by Chicago chapters of the NAACP and the Southern Christian Leadership Conference) [hereinafter cited as MAINTENANCE OF RACIAL RESIDENTIAL DIVERSITY]. See also Hayes, *Managed Integration*, *supra* note 5.

⁷ See The Sun Press (Beachwood, Ohio), *supra* note 5; The Cleveland Press, Sept. 12, 1980, at A1, col. 4; The Plain Dealer (Cleveland, Ohio), Sept. 13, 1980, at A5, col. 1.

⁸ *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974) (the circuit

financed by the National Association of Realtors, the Ohio Association of Realtors and the Cleveland Area Board of Realtors, is aimed more broadly at the general policy of maintaining residential integration by municipalities.⁹

Commentators who have considered the legal validity of race-conscious efforts to sustain residential integration and prevent neighborhood resegregation have concluded that such efforts may be valid.¹⁰ The discussion to date has been highly theoretical, however, and legal commentators have not looked closely at specific programs.¹¹ Case law in the area of

court reversed the district court and upheld a municipal ban of "for sale" signs); *Linmark Assocs., Inc. v. Township of Willingboro*, 535 F.2d 786 (3d Cir. 1976), *rev'd*, 431 U.S. 85 (1977) (the circuit court's decision upholding a municipal ban of "for sale" signs was reversed by the Supreme Court, but in doing so it left *Barrick* intact).

⁹ *Smith v. City of Cleveland Heights*, No. C 80-1695 (N.D. Ohio, filed Sept. 12, 1980) seeks to strike down City Resolution 26-1976, which proclaims: a comprehensive program to promote Cleveland Heights as a well-maintained, full service residential community, to prevent racial resegregation, and to foster an increased joint effort with Cleveland Heights residents, community organizations, the Board of Education, the business community, and other institutions in the development and implementation of the described program; . . .

¹⁰ McGlasson, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377 (1981); Note, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938 (1980) [hereinafter cited as *Benign Steering*]. But see Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891.

¹¹ See McGlasson, *supra* note 10, at 377-99; Smolla, *supra* note 10, 891-939; *Benign Steering*, *supra* note 10, at 935-65. There seem to be three types of commentators on issues related to race, housing and public policy—lawyers, social scientists and program developers. There is an unfortunate lack of contact among them. There has been more contact between program developers and social scientists than between program developers and lawyers. See, e.g., G. ORFIELD, HOUSING PATTERNS AND DESEGREGATION POLICY IN EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY 185-221 (W. Hawley ed. 1981). Orfield, a political science professor at the University of Chicago, has researched both housing and school desegregation efforts around the country. The results of his research are particularly useful for local policy makers. See ORFIELD, MUST WE BUS? (1975); RACIAL SEGREGATION: TWO POLICY VIEWS (1979) and TOWARD A STRATEGY FOR URBAN INTEGRATION (1981). Lawyers writing about fair housing as it relates to affirmative action and integration have not displayed much familiarity with the concepts or the actual programs used by program developers. Their work has not satisfied the needs of program and policy planners working on affirmative action in housing. Program developers have not published much on affirmative action at the community or municipal level and their work comes to focus for lawyers in the context of litigation rather than in the context of public policy development. But see L. HEUMANN, INTEGRATION MAINTENANCE PROGRAM EVALUATION PART I: REPORT OF FINDINGS FOR THE VILLAGE OF PARK FOREST, ILLINOIS (1981) (a study conducted by the Housing Research and Development Pro-

governmental policies favoring housing integration is very limited and answers few questions for proponents of residential integration or those opposing programs to protect residential integration. There is an unfortunate lack of contact between lawyers and planners in the fair housing field.

This Article focuses on the policies and programs that can be established to sustain racial diversity in housing. It reviews the circumstances that give rise to such policies and programs, describes the legal framework within which they must be fit, and examines some of them in light of the needs and interests of policy makers in communities that are open to minority groups. Since effective housing integration policies and programs can vary significantly from one place to another, each municipality must consider its options in view of its circumstances and the changing conditions in its housing market. In response to the question of whether fair housing laws and the Constitution permit the use of race-conscious policies and programs to maintain integrated housing patterns, the answer may very likely be one every law student learns in the first term—it all depends.

II. BACKGROUND

Housing integration occurs as a deviation from the prevailing reality of a basically segregated urban housing picture.¹² Racial ghettos began

gram, University of Illinois at Urbana-Champaign); Stake, *Fair Housing in Illinois: The Role of Municipal Government in the Desegregation of Metropolitan Communities*, 67 ILL. B.J. 352 (1979) (an introduction for the legal practitioner in municipal government who encounters the problem for the first time); AFFIRMATIVE ACTION IN HOUSING, *supra* note 4 (which states the position of a coalition of open housing advocates, organization and governmental units in metropolitan Chicago). One notable exception is Alexander Polikoff, an attorney who directs an organization called Business and Professional People for the Public Interest in Chicago. The organization provides legal assistance to policy makers on open housing matters. Polikoff has recently been conducting research on legal aspects of municipal open housing programs.

¹² Sociologists have described residential segregation using the index of dissimilarity, or segregation index. It is expressed as a number between zero (no segregation) and 100 (complete segregation). It indicates the percentage of a group that would have to move in order to achieve a balance of racial composition in each geographic unit equal to the balance of a city's population as a whole. The 1970 index of segregation for urban blacks in the United States was 75. Hershberg, Burstein, Ericksen, Greenberg and Yancey, *A Tale of Three Cities: Blacks and Immigrants in Philadelphia: 1850-1880, 1930 and 1970*, 441 ANNALS 55, 62 n.9 (1979). See also R. LAKE, *THE NEW SUBURBANITES: RACE AND HOUSING IN THE SUBURBS* 3-73 (1981); K. TAEUBER and A. TAEUBER, *NEGROES IN CITIES* 28-37 (1965). A recent report, based on 1980 census data analyzed by Karl Taeuber, shows that in a comparison of 28 of the largest central cities, Chicago and Cleveland ranked highest, with segregation indices of 92 and 91 respectively, while Oakland and Gary, Ind., were lowest, with indices of 59 and 68 respectively. The average index for these 28 cities was 81. CITIZENS COMMISSION ON CIVIL RIGHTS, *A DECENT HOME . . . A REPORT ON THE CONTINUING FAILURE OF THE FEDERAL GOVERNMENT TO PROVIDE EQUAL HOUSING OPPORTUNITY*, Appendix, 7 (1983).

to develop in the early years of this century in northern industrial cities and later spread to virtually every metropolis in the country.¹³

While ethnic ghettos have not confined the descendants of Europeans who migrated to America and improved their economic lot, the racial ghettos have confined dark-skinned people regardless of economic achievement.¹⁴ Racial ghettoization was substantially augmented during the housing boom and suburbanization following World War II.¹⁵ After whites and blacks were separated in the cities, affluent whites moved to the new suburbs in large numbers. Home ownership in an expanding housing market aided by large tax deductions, government subsidization of mortgage costs, and inflated housing values helped white suburban Americans accumulate personal wealth. In contrast, black Americans were confined to less affluent neighborhoods where few owned their own housing and where housing values did not increase as much as they had in the suburbs. In this way segregated housing has separated whites and blacks geographically. It has also reinforced inequality in wealth, education, employment, public services, and virtually every other aspect of life.

The ghettoization of urban America is the result of many forces. Racial discrimination in the development, rental, sale and financing of housing is one major force. Another factor is the racially discriminatory policies and practices of government at all levels.¹⁶ Until 1968, racial discrimination in the private development, sale, financing, appraising, rental or adver-

¹³ Sorenson, Taeuber and Hollingsworth, *Indexes of Racial Residential Segregation for 109 Cities in the United States, 1940 to 1970*, 8 SOC. FOCUS 125 (1975).

¹⁴ *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio) (liability opinion), 504 F. Supp. 913 (N.D. Ohio 1980) (remedial order), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *aff'd in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1972 (1982). The district court opinion summarizes a study of the Cleveland area by Dr. John Kain showing how European immigrants moved from ethnic ghettos as they gained affluence while blacks of middle class economic status remained restricted in a racial ghetto. 494 F. Supp. at 1062-65.

¹⁵ 494 F. Supp. 1062-65. See also statement of Senator Mondale (later Vice-President) on the floor of the Senate during the debate of the Federal Fair Housing Act:

A sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.

The record of the U.S. Government in that period is one, at best, of covert collaboration in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color. 114 CONG. REC. 2278 (1968).

The historical record on governmental and privately enforced racial segregation is conveniently summed up in CITIZENS COMMISSION ON CIVIL RIGHTS, *supra* note 12, at 2-16.

¹⁶ 114 CONG. REC. 2278 (1968).

tising of housing was not prohibited by law. The development of the housing industry and the post-war housing boom in the suburbs took the legitimacy of racial discrimination for granted. Business practices and institutional structures that took segregation for granted provided separate and unequal housing for whites and blacks.¹⁷

The post-war flight of whites from city neighborhoods to new suburban housing was the major source of growth and revenue for the housing industry. Suburban flight was often launched by marketing tactics pandering to racial fear and prejudice. Blockbusting, panic peddling and steering resulted in rapid removal of whites to new neighborhoods.¹⁸ Interracial neighborhoods were not regarded as a legitimate part of the system; they were assumed to be in a state of pathological transition.¹⁹ Although declared unlawful, flagrantly racist practices in real estate sale, financing, rental and appraising remained prevalent because fair housing laws were weak and poorly enforced.²⁰ Moreover, many practices considered normal in the real estate sales business, such as solicitation for listings door-to-door or by telephone and intensive use of "for sale" signs, are indistinguishable from racially discriminatory panic selling because those "benign" practices have been frequently used to encourage whites to sell in a hurry and flee to another neighborhood.

In addition to segregated conditions and discriminatory practices in the real estate industry, the behavior of consumers—buyer and seller, black and white—made, and still makes, the segregated housing market difficult to resist. Black homebuyers are often afraid to consider living in white neighborhoods or communities reputed to be hostile to racial diversity.²¹ It is easier for them to limit their search to interracial

¹⁷ See R. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS (1969); UNITED STATES COMMISSION ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING, CLEARHOUSING PUBLICATION No. 24 (1973); AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 3; NATIONAL ASSOCIATION OF REALTORS, REALTOR'S GUIDE TO PRACTICE: EQUAL OPPORTUNITY IN HOUSING, 20-21 (1975).

¹⁸ A vivid description of this is offered in *Zuch v. John H. Hussey Co.*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (*per curiam*).

¹⁹ *Id.* See also AFFIRMATIVE ACTION IN HOUSING, *supra* note 4; MAINTENANCE OF RACIAL RESIDENTIAL DIVERSITY, *supra* note 6.

²⁰ UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT (1979) (Federal Government's fair housing enforcement effort was deficient in that (1) the federal fair housing law does not provide for adequate enforcement mechanisms; (2) federal agencies have not carried out their duty; and (3) too little has been appropriated).

²¹ Staff members of the Housing Information Service of the Cuyahoga Plan of Ohio in Cleveland who counsel minority group homeseekers on locational choices in the housing market report that most black homeseekers fear for their safety in all-white areas with which they are not familiar, and many fear all-white areas they work in or travel in regularly. Housing counselors in cities all over the country report that many blacks do not consider housing choices that would be advantageous because of a fear of white neighborhoods. Real estate agents, both black and white, report similar experiences. See also *United States v. City of Parma*,

neighborhoods because those neighborhoods are familiar and thought to be more free of discrimination and hostility. Black or minority group real estate salespersons work almost exclusively in black or integrated neighborhoods, rarely showing prospective black buyers homes in other areas. White homebuyers, on the other hand, are generally unfamiliar with interracial neighborhoods and are under the impression that no neighborhood will remain permanently interracial. The lack of confidence in the permanency of neighborhood racial diversity among whites is a factor in the continuation of segregated housing patterns.²²

The prevalence of housing segregation has not diminished much since the passage of fair housing laws. Whites and blacks are nearly as unlikely to live together in the same neighborhoods now as in 1970.²³ Although housing marketing practices in some areas are less blatantly discriminatory, there is strong evidence that real estate sales practices still disadvantageously affect interracial neighborhoods.²⁴ This means that a significantly interracial neighborhood or community is threatened by segregating housing market forces.²⁵ This is especially true for interracial areas that are

494 F. Supp. 1049, 1057-68 (N.D. Ohio 1980) for an explanation of why blacks so rarely consider housing choices in white communities.

²² R. LAKE, *THE NEW SUBURBANITES: RACE AND HOUSING IN THE SUBURBS* 240 (1981); Goering, *Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence*, AM. INST. PLAN., Jan. 1978, at 68-77.

²³ Research by the Cuyahoga Plan of Ohio based on the 1980 census indicates that, in 1980, 72% of the metropolitan population of Cuyahoga County lived in a neighborhood that is more than 95% non-white or more than 95% white in racial composition. Nearly 50% of the population lives in a neighborhood that is more than 99% non-white or 99% white. In a county that was nearly 25% non-white it is obviously more likely that whites will live in racial isolation than blacks. A recent study by Karl Taeuber, based on 1980 census data for 28 of the largest cities, shows that in two cities, Cleveland and St. Louis, 67% of the nonblacks live on blocks where no blacks live. In St. Louis 22%, and in Cleveland 18%, of blacks live on blocks that have no nonblacks. CITIZENS COMMISSION ON CIVIL RIGHTS, *supra* note 12, Appendix, 7. See also T. CLARK, *BLACKS IN SUBURBS: A NATIONAL PERSPECTIVE*, Center for Urban Policy Research, New Brunswick, N.J. (1979); E. GRIER and G. GRIER, *BLACK SUBURBANIZATION AT THE MID-1970's*, the Washington Center for Metropolitan Studies, Washington, D.C. (1978); K. NELSON, *RECENT SUBURBANIZATION OF BLACKS: HOW MUCH, WHO AND WHERE?*, Office of Policy Development and Research, U.S. Dept. of HUD (1979).

²⁴ Goering, *supra* note 22. "None of the research or modeling of the process of racial succession provides any reason for optimism about the future of neighborhood racial integration in American cities." *Id.* at 76.

²⁵ *Id.* See also *AFFIRMATIVE ACTION IN HOUSING*, *supra* note 4, where it states: Given decades of history that the entry of blacks into a neighborhood signals its transition to an all-black neighborhood; given that many neighborhoods are still closed to blacks; given the natural tendency of minority families to seek housing in areas where they know they will be welcomed; given the wider range of choice open to whites—all these factors push newly integrated neighborhoods in the direction of becoming all-minority neighborhoods.

Id. at 40.

located between a predominantly black area and a predominantly white area.

Not all suburban communities and city neighborhoods that became interracial in the 1960's and early 1970's are allowing the housing market to push them toward resegregation without a fight. Often, volunteer community groups originate the integration effort; then they enlist the resources of local government.²⁶ The motivation for sustaining integrated housing patterns seems to be a marriage of high principle and conservative self-interest. There is the desire for an open housing market free of racial discrimination mixed with the fear of losing an investment in neighborhoods, schools, churches, temples, businesses and personal wealth to resegregation.

The policies and programs of integration maintenance are usually found in suburban communities but rarely found in central cities.²⁷ In some communities the approach is limited to one or two measures while in others there is a variety of programs forming a more comprehensive approach.

²⁶ One example is the Ludlow Community Association in a small neighborhood encompassing equal parts of Cleveland and Shaker Heights, Ohio. It was organized in 1957 as "an integrated effort for integrated living." It, along with groups in the nearby Lomond and Moreland neighborhoods, helped to develop the Shaker Heights Housing Office as a department of the City of Shaker Heights. See H. OBERMANN, A GUIDE TO COMMUNITY PROGRAMS FOR RACIAL DIVERSITY AND COMMUNITY REVITALIZATION (1981) (distributed by the Heights Community Congress, Cleveland Heights, Ohio) (Obermann's guide consists primarily of a collection of descriptive statements or other information submitted to him by the racially diverse communities he studied.) [hereinafter cited as H. OBERMANN, A GUIDE]. In Cleveland Heights, Ohio various civic and religious groups interested in open housing and integration encouraged municipal fair housing action. In 1972 a large coalition called the Heights Community Congress was formed to provide an organizational focus for citizen involvement to maintain Cleveland Heights as an open, integrated community of the highest quality.

²⁷ H. OBERMANN, STABILITY AND CHANGE, *supra* note 4, suggests three factors that may help suburbs maintain integration more successfully than central city neighborhoods: (1) they are small, politically independent communities; (2) higher socio-economic status; (3) timing. *Id.* at 2.

For program planners and directors in interracial communities there is an important distinction between "integration maintenance" and "integration management" which is often overlooked. Integration maintenance means the use of information, education and service programs to encourage voluntary conduct by housing consumers, providers or other mediaries consistent with sustaining an integrated housing market and avoidance of a segregated one-race market. Integration management employs many of the same features as integration maintenance but, in addition to persuasion, places limitations or prohibitions on consumer choice. The most prevalent examples of integration management are mandatory tenant selection policies of public housing authorities designed to assure racial diversity in public housing facilities. Most public or privately-run integration maintenance programs reject integration management as a policy. Opponents of integration maintenance often merge the two concepts in order to attack all integration support efforts as restrictive, coercive limitations on the exercise of choice.

In virtually every case there is recognition that the community is vulnerable and threatened, and that without an organized, well-supported effort, integrated housing patterns will be turned into segregated ones.²⁸

Interracial communities share a view that traditional housing market conditions and processes are hostile to their continued interracial character.²⁹ They are aware of the failure of suburbs like Dixmoor, East Chicago Heights, Markham, Maywood, Phoenix and Robbins in the Chicago area and East Cleveland in the Cleveland area to maintain racially mixed housing patterns and school enrollment. They are aware of other suburbs like Blue Island, North Chicago, Chicago Heights or Hammond in the Chicago area, and Garfield Heights or Warrensville Heights in the Cleveland area, where black and white households are concentrated in separate parts of the same municipality. They also share the view that traditional real estate practices, and the organizations that defend those practices, are a large part of the problem, not part of the solution.³⁰ Policies and programs for maintaining integrated housing are developed in response to segregated conditions and segregating processes, and they cannot properly be examined without reference to that context.

III. LEGAL FRAMEWORK

The sources available from which to develop a legal framework for policies and programs to prevent segregation and maintain interracial residency patterns consist of the Civil Rights Act of 1866, Title VIII of the Civil Rights Act of 1968, federal regulations and executive orders based on Title VIII and the first, thirteenth and fourteenth amendments to the Constitution. Judicial construction of these laws in fair housing cases over the past decade provides some help in understanding the role of fair housing law in relation to housing integration.³⁰⁻¹

²⁸ Goering, *supra* note 22. See also Singerman, *We Must Avoid Turning Integration into Apartheid*, NATION'S CITIES WEEKLY, Oct. 20, 1980, at 11. G. ORFIELD, TOWARD A STRATEGY FOR URBAN INTEGRATION 18 (1981).

²⁹ An explanation of how the housing market works against stable racial diversity is found in J. WUNKER, W. SCOTT, D. DEMARCO and D. ONDERDONK, AFFIRMATIVE MARKETING HANDBOOK: A GUIDE TO INTEGRATED HOUSING (1979).

³⁰ The south Chicago suburb of Markham offers an example. In 1967, the Human Relations Commission reported that the city was open to all races and pledged to strive for full attainment of the goal of integration.

This Commission worked actively to implement peaceful integration and cooperated with the Veterans' Administration, the Illinois Commission on Human Relations and the real estate brokers handling non-white sales. Now that we are working just as hard to maintain that integration we find not only a lack of cooperation from these sources, but actual opposition.

MAINTENANCE OF RACIAL RESIDENTIAL DIVERSITY, *supra* note 6, at 3.

³⁰⁻¹ After this article was written an indispensable guide to fair housing law appeared: R. SCHEMM, HOUSING DISCRIMINATION LAW (1983).

A. *Civil Rights Act of 1866*³¹

On April 9, 1866 the Civil Rights Act of 1866 was passed over the veto of President Andrew Johnson and therefore reflects strong congressional consensus.³² That Act provides in part that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."³³ In the latter part of the nineteenth century the Supreme Court interpreted this law to protect rights against state action but not against racial discrimination in private dealings. The Act was rarely invoked and there were few cases construing it before 1968. In that year the Supreme Court again reviewed the Civil Rights Act of 1866 in *Jones v. Mayer* and found that Congress intended for it to bar "all racial discrimination, private as well as public, in the sale or rental of property."³⁴ The Court based its interpretation of the Act on the legislative history rather than on preceding judicial interpretations.³⁵ The Court recalled that the Act was first introduced less than one month after the thirteenth amendment to the Constitution and that its declared purpose was to give practical effect to the freedom from slavery guaranteed by the amendment.³⁶ In approving the bill, Congress intended to employ the power of the federal government to deal with whites and whoever would invoke the power of local prejudice against blacks in private transactions involving property.³⁷ *Jones v. Mayer* established that the Civil Rights Act of 1866, by its language and its purpose, prohibited all racial discrimination against black Americans in the sale or rental of property.

The Supreme Court has not decided a case involving race-conscious affirmative action in housing under the Civil Rights Act of 1866. It is unlikely, however, that the wording of the statute or its legislative history requires a strictly colorblind application preventing race-conscious affirmative action. Indeed, the historical record shows that the passage of the 1866 Act on the heels of the thirteenth amendment was emphatically a race-conscious attempt to prevent whites from maintaining segregation by imposing restrictions on blacks in property acquisition and ownership.³⁸

³¹ 42 U.S.C. § 1982 (1976).

³² The history of the Act, the debates in the House and the Senate, the veto and the override of the veto are all described in *Jones v. Mayer*, 392 U.S. 409 (1968).

³³ 42 U.S.C. § 1982 (1976).

³⁴ *Jones v. Mayer*, 392 U.S. at 437.

³⁵ *See id.* at 420 n.25.

³⁶ *Id.* at 429-31, 430 n.48.

³⁷ *Id.* at 433.

³⁸ The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white

The thirteenth, fourteenth and fifteenth amendments have consistently been interpreted as being race-conscious.³⁹

B. *Title VIII*

Title VIII of the Civil Rights Act of 1968 established the present federal fair housing policy. It is undoubtedly Congress's most important statement regarding fair housing. Even though the Act itself did not define "fair housing" and failed to spell out precisely how the United States would "provide, within constitutional limitations, for fair housing . . .,"⁴⁰ it stands as "a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority."⁴¹

The legislative history is important for an understanding of the purpose of the Act.⁴² Its chief sponsor, Senator Mondale, said that a purpose of the legislation was to "permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it."⁴³ In this manner the "block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns."⁴⁴ Senator

citizens who assaulted Negroes or who combined to drive them out of their communities.

. . . .

[Proponents of the bill] defended the propriety of employing federal authority to deal with the white man . . . [who] would invoke the power of local prejudice against the Negro.

Id. at 427, 433.

³⁹ See, e.g., historical reviews in *Slaughter House cases*, 83 U.S. (16 Wall.) 36 (1872); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

⁴⁰ 42 U.S.C. § 3601 (1976).

⁴¹ *Mayer*, 392 U.S. at 417. 42 U.S.C. § 3604 was amended in 1974 to add sex as a prohibited basis for discrimination in subsections a through e.

⁴² See Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); R. SCHEMM, *HOUSING DISCRIMINATION LAW*, 32-36.

⁴³ 114 CONG. REC. 3421 (1968). Several times during the debate on Senator Mondale's Fair Housing Amendment he and other Senators (e.g., Brooke, Hart, Javits, Percy) emphasized that this bill would not protect black homebuyers from economic exclusion. The statement of purpose quoted in the text was made in the context of an argument against the myth that integration lowers property values.

Experience under the District of Columbia's fair housing ordinance demonstrates that the number of Negroes in previously all-white areas of the city is regulated strictly by their ability to pay.

Once again . . . I emphasize that the basic purpose of this legislation is to permit people who have the ability to do so, to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.

Id.

⁴⁴ 114 CONG. REC. 3422 (1968). Senator Mondale and Senator Brooke spoke urgently about the need to remove "forced segregation." Senator Brooke: "We

Javits saw the bill as beneficial to the whole community, not merely the minority group victims of discrimination.⁴⁵ Courts construing Title VIII have generally held that its purpose is both to prohibit housing discrimination based on race, color, religion, sex or national origin and to replace ghettos with integrated and balanced living patterns.⁴⁶ Title VIII consists of nineteen sections. Most important to this analysis are those sections which detail who is protected, the conduct that is prohibited, the governmental conduct that is prohibited and the governmental conduct that is required.

The statute provides protection to anyone who is denied or discriminated against in an attempt to buy or rent a dwelling, or in an attempt to get information about a dwelling for sale or rent.⁴⁷ Standing to com-

are trying to keep Negroes living in segregated ghettos in the Nation, and what we need to do is destroy these ghettos." *Id.* at 2282. Senator Mondale:

[S]egregated housing is the simple rejection of one human being by another without any justification but superior power; we have closed our hearts to our fellow human beings to the extent that we have closed our neighborhoods to them.

. . . .

America's goal must be that of an integrated society, a stable society free of the conditions which spawn riots, free of riots themselves. Yet trends of drift and civil disorder make the goals of integration and stability seem ever farther. If America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation.

Id. at 342.

⁴⁵ 114 CONG. REC. 2706 (1968).

⁴⁶ The Supreme Court stated in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972), that while members of minority groups were damaged the most from discrimination in housing practices, those who were not direct objects of discrimination also had an interest in ensuring fair housing, as they too suffered. The Court quoted the Javits and Mondale statements cited in the text above to show the breadth of Title VIII. The Court asserted that replacement of ghettos with integrated living patterns was a national policy of high priority in *Linmark Assocs., Inc. v. Township of Willingboro*, 535 F.2d 786 (3d Cir. 1976), *rev'd*, 431 U.S. 85 (1977). Lower courts have seen the purpose of the Act to include a duty to integrate. *United States v. City of Parma*, 494 F. Supp. 1049 (6th Cir. 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1972 (1982); *King v. Harris*, 464 F. Supp. 827 (E.D.N.Y. 1979), *aff'd mem.*, 614 F.2d 1288 (1979), *vacated on other grounds*, 446 U.S. 905 (1980); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Fair Hous. Council, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.C.N.J. 1976); *Zuch v. John H. Hussey Co.*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (*per curiam*).

⁴⁷ In *Havens Realty Corp. v. Coleman*, ___ U.S. ___, 102 S. Ct. 1114 (1982) the Supreme Court found that 42 U.S.C. § 3604(d), which states that it is unlawful for an individual or firm covered by the Act "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available, . . ." confers a legal right on all persons, whether they are actual homeseekers or not, to truthful information about available housing. *Id.* at ___, 102 S. Ct. at 1121.

plain or to bring suit under Title VIII has been granted to white persons in apartment buildings from which blacks have been excluded,⁴⁸ black and white residents of interracial communities injured by racial steering of whites out of and blacks into interracial neighborhoods,⁴⁹ community organizations in interracial areas,⁵⁰ fair housing agencies needing housing information for homeseekers they counsel,⁵¹ testers who ask for housing information as surrogate homeseekers,⁵² developers blocked in their efforts to build housing for interracial occupancy⁵³ and municipal governments in interracial communities injured by unlawful practices.⁵⁴ The Supreme Court has consistently extended standing to the limits allowable under Article III of the Constitution whenever an injury could be shown by the party seeking standing.⁵⁵

The prohibitions in Title VIII are aimed primarily at commercial conduct discriminating on the basis of race, color, religion, sex, or national origin. Section 3603(c) defines the business of selling or renting dwellings in order to establish who is exempted from compliance with Title VIII.⁵⁶ This definition and the express language of section 3603(b)(1) seem to indicate an intention to prohibit discrimination by those in the business of selling or renting dwellings.⁵⁷ Most of the litigation in the fair housing

⁴⁸ *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

⁴⁹ *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D. Wis. 1980); *Wheatley Heights Neighborhood Coalition v. Jenna Resales*, 429 F. Supp. 486 (E.D.N.Y. 1977).

⁵⁰ *Havens Realty Corp. v. Coleman*, ___ U.S. ___, 102 S. Ct. 1114 (1982).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972).

⁵⁴ *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D. Ill. 1979).

⁵⁵ *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

⁵⁶ (c) For the purposes of subsection (b), a person shall be deemed to be in the business of selling or renting dwellings if—

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has within the preceding twelve months, participated as agent other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

42 U.S.C. § 3603(c) (1976).

⁵⁷ (b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to—(1) any single-family house sold or rented by an owner: *Provided*, that such private individual owner does not own more than three such single-family houses at any one time: *Provided further*, that in the

field has been directed against unlawful real estate sales and rental practices by owners or those in real estate business. Conduct by neighbors or homeowners associations which interfered with and denied completion of negotiation of an offer to buy a dwelling has also been found to be a violation.⁵⁸ Section 3617 prohibits interference, coercion or intimidation of any person exercising rights granted under sections 3603-06.⁵⁹ This section also prohibits interference, coercion or intimidation directed at those, such as fair housing advocates, who aid or encourage others in the exercise of their fair housing rights.⁶⁰

case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: *Provided further*, that such bona fide private individual owner does not own any interest in nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental or, more than three such single-family houses at any one time: *Provided further*, that after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this title only if such house is not sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any broker, agent, salesman, or person and (B) without the publication posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or (2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

42 U.S.C. § 3603(b) (1976).

⁵⁸ *Phillips v. Butler*, [LAWS, REGULATIONS, DECS.] E.O.H. (P-H) ¶ 15,388 (N.D. Ill. July 22, 1981).

⁵⁹ Real estate brokers have a cause of action against sellers of property when sellers refuse to pay commissions because brokers aided black buyers to buy real estate. *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977). Municipal interference with a prospective developer's ability to construct integrated housing by enacting ordinances precluding construction of low-cost housing is a violation of 42 U.S.C. § 3617. *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1972 (1982).

⁶⁰ A Georgia realty firm brought suit in state court seeking damages against persons who had participated in a program of auditing real estate practices by posing as homeseekers. The defendant "testers" moved the case into federal court where they were granted the right to show that their activity was protected by 42 U.S.C. § 3617, and that the realty firm's action against them had the effect of coercing, intimidating and threatening interference with their right to aid others

Conduct prohibited under Title VIII includes that which is subtle and indirect. The phrase "otherwise make unavailable or deny" in section 3604(a) has been construed as broadly as Congress could have made it.⁶¹ Within the realm of real estate sales and rental practice, it prohibits racial steering which perpetuates segregation,⁶² it has been applied to delaying or manipulating of rental applications,⁶³ and it has also been applied to zoning,⁶⁴ to appraising⁶⁵ and to the providing of property insurance.⁶⁶

Conduct which has a racially discriminatory effect has been found to violate Title VIII even without proof of intent.⁶⁷ In this regard Title VIII is analogous to Title VII of the Civil Rights Act of 1964 which prohibits employment practices that have a discriminatory effect. Sections 3604(a), (b) and (d) of the 1968 Act prohibit practices which make unavailable or deny a dwelling to any person because of race.⁶⁸ The "because of race" language has been interpreted to prohibit the conduct based on its necessary and foreseeable consequence. The effect test has been applied to municipalities in situations where the effect of conduct perpetuated segregated housing patterns.⁶⁹

to enjoy their fair housing rights. *Northside Realty Assocs. v. Chapman*, 411 F. Supp. 1195 (N.D. Ga. 1976). *See also* *Green v. Griffiths*, 10 E.O.H. (P-H) ¶ 15,289 (S.D. Ohio Apr. 17, 1979), *aff'd*, 10 E.O.H. (P-H) ¶ 15,378 (6th Cir. Feb. 18, 1981) (crossclaim against fair housing organization was dismissed as frivolous).

⁶¹ *Dunn v. Midwestern Indem. Midamerican Fire and Cas. Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979); *Zuch v. John H. Hussey Co.*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (per curiam); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975).

⁶² *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D. Wis. 1980); *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D. Ill. 1979); *Zuch v. John H. Hussey Co.*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (per curiam).

⁶³ *See Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977).

⁶⁴ *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1972 (1982).

⁶⁵ *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

⁶⁶ *Dunn v. Midwestern Indem. Midamerican Fire and Cas. Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979).

⁶⁷ *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). *See also* *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1972 (1982); *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D. Ill. 1979); *United States v. Real Estate One*, 433 F. Supp. 1140, 1150 (E.D. Mich. 1977).

⁶⁸ *See* 42 U.S.C. § 2000e-2(a) (1976); *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980).

⁶⁹ *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1972 (1982).

Title VIII not only contains prohibitions against certain types of discrimination in housing, it also imposes an affirmative duty to promote integrated residential patterns. This duty is placed first on the Secretary of the Department of Housing and Urban Development (HUD) and extends to other governmental agencies. Section 3608(c) states that "All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary to further such purposes."⁷⁰ The affirmative duty attaches to all federal housing and urban development programs including the Community Development Block Grant (CDBG) program administered by local jurisdictions. Recipients of funds give assurances of compliance with Title VIII as a condition of receiving their grants.⁷¹ An Executive Order providing for the administration of all federal programs and activities relating to housing and urban development in a manner affirmatively to further fair housing was promulgated December 31, 1980. It makes the heads of each agency of the executive branch responsible for ensuring that the programs and activities of the agency are administered affirmatively to further fair housing, and it gives the Secretary of HUD a list of specific responsibilities including responsibility to enforce compliance with the Executive Order at the state and local level where there is any federally assisted program or activity relating to housing and urban development.⁷² Inasmuch as the purposes of Title VIII include replacing ghettos with truly integrated and balanced living patterns, there is a special duty imposed upon municipal recipients of CDBG funds to promote and maintain integrated housing against the likelihood of segregation.

The duty to integrate has been tested in regard to public housing authorities and HUD. In *Otero v. New York Housing Authority*,⁷³ minority persons who were potential tenants attacked a special policy of allocating public housing dwelling units on a basis that reserved some units for whites in a building that would otherwise be racially segregated. The Second Circuit upheld the housing authority and HUD in their affirmative effort to maintain integrated housing "even though this may in some instances not operate to the immediate advantage of some nonwhite persons."⁷⁴

⁷⁰ 42 U.S.C. § 3608(c) (1976).

⁷¹ 24 C.F.R. § 570.601 (1980) outlines the prohibited discriminatory actions and a requirement to ameliorate the effects of past discrimination which would include segregated housing patterns.

⁷² 46 C.F.R. § 1253 (1980) *reprinted* in 42 U.S.C.S. § 3608 app. at 186-88 (Supp. 1982). *See also* Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970) (HUD must consider the effects of its site selection policies on integration); Jorman v. Veterans Admin., 500 F. Supp. 460 (N.D. Ill. 1980) (the VA as an agency required to consider whether the impact of its activities is encouraging the racial resegregation of a community).

⁷³ 354 F. Supp. 941 (D.C.N.Y.), *rev'd*, 484 F.2d 1122 (2d Cir. 1973).

⁷⁴ *Otero*, 484 F.2d at 1125.

Similarly, in *Barrick Realty v. City of Gary*,⁷⁵ the Seventh Circuit Court of Appeals affirmed the city's efforts to prevent resegregation by imposing a "for sale" sign ban, and declared that "the right to open housing means more than the right to move from an old ghetto to a new ghetto."⁷⁶ These decisions, along with interpretive comments in Supreme Court opinions,⁷⁷ clearly establish that Title VIII not only prohibits racial discrimination but it also supports, and where HUD is involved it requires, affirmative efforts to promote integrated residential patterns. Where municipal governments or housing authorities have been found to have violated Title VIII, they have acted to prevent or discourage integrated residential patterns. In *United States v. City of Parma*,⁷⁸ for example, the court considered the all-white racial composition of the city along with other evidence of discrimination in its housing policies. In *United States v. City of Blackjack*⁷⁹ the court found that an almost exclusively white village next to a black ghetto had unlawfully sought to keep out low-cost housing.

In *Otero*, on the other hand, there was a clear confrontation between a governmental agency's duty to promote or maintain racial integration and a demand of minority group homeseekers for specified dwelling units. The district court held that despite the housing authority's duty to foster and maintain racial integration in its facility, that duty could not be given effect where it would deprive a nonwhite minority of housing otherwise available.⁸⁰ The circuit court disagreed:

Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat. (Citations omitted.)

. . . .

The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing. The purpose of racial integration is to benefit the community as a whole, not just certain of its members.⁸¹

The court further instructed that the authority must ascertain the likelihood of the integrated community's developing pockets of segrega-

⁷⁵ 491 F.2d 161 (7th Cir. 1974).

⁷⁶ *Id.* at 164.

⁷⁷ See *Linmark Assocs., Inc. v. Township of Willingboro*, 535 F.2d 786 (3d Cir. 1976).

⁷⁸ 494 F. Supp. 1049 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1972 (1982).

⁷⁹ 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

⁸⁰ 354 F. Supp. 941 (D.C.N.Y.), *rev'd*, 484 F.2d 1122 (2d Cir. 1973).

⁸¹ *Otero*, 484 F.2d at 1134 (citations omitted).

tion and the likelihood of "tipping" toward resegregation in order to justify a policy of tenant selection designed to maintain its building in racial balance.⁸²

*Otero, Gautreaux v. Landrieu*⁸³ and *Banks v. Perk*⁸⁴ all indicate a strong duty of local government agencies to promote and maintain integrated residential patterns. Where this local duty conflicts with the racial discrimination prohibited in Title VIII, the duty to integrate may prevail where it can be shown that the integration maintenance measure "is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community."⁸⁵

C. The Constitution

The primary constitutional basis for federal fair housing law is the thirteenth amendment.⁸⁶ Victims of racial bias have claimed the protection of the thirteenth amendment. However, victims of housing bias by a governmental unit have sought and obtained protection under the fourteenth amendment.⁸⁷ Cases have also arisen where constitutional claims have been directed against attempts by local governments to preserve residential integration or to prevent resegregation.⁸⁸ These cases indicate that the first and fourteenth amendments impose at least some limitation on the actions that can be taken by municipalities to maintain racially diverse residential patterns.

The most successful first amendment attack on municipal action banning use of "for sale" signs is found in *Linmark Associates, Inc. v. Township of Willingboro*.⁸⁹ The township perceived that the use of "for sale" signs would encourage panic selling by white homeowners in racially diverse neighborhoods, so it banned the use of "for sale" signs in front of residen-

⁸² *Id.* at 1135.

⁸³ 498 F. Supp. 1072, 1075 (N.D. Ill. 1980).

⁸⁴ 341 F. Supp. 1175 (N.D. Ohio 1972).

⁸⁵ *Otero*, 484 F.2d at 1140. See also *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 493 F. Supp. 1225 (S.D.N.Y. 1980), (defendant housing manager must bear burden of showing the necessity of measures that limit choice).

⁸⁶ *Jones v. Mayer*, 392 U.S. 409 (1968). On the constitutional basis for Title VIII see *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826, *reh'g denied*, 414 U.S. 1087 (1973). See also R. SCHWEMM, *HOUSING DISCRIMINATION LAW*, 36-37.

⁸⁷ *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1972 (1982).

⁸⁸ *E.g.*, *Linmark Assocs., Inc. v. Township of Willingboro*, 535 F.2d 786 (3d Cir. 1976), *rev'd*, 431 U.S. 85 (1977); *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974); *Association of Realtors v. Village of Bellwood*, 516 F. Supp. 1067 (N.D. Ill. 1981).

⁸⁹ 431 U.S. 85 (1977).

tial property. The ordinance was attacked by a real estate firm as an unconstitutional limitation of free speech. Although the Supreme Court ultimately found Willingboro's sign ban unconstitutional, it plainly did not rule that the first amendment prevented all restrictions of "for sale" signs. The Court's ruling was a narrow one and should be read in the context of changes in the traditional commercial speech exception to the first amendment.⁹⁰

The extension of first amendment protection to include some communication that was distinctly commercial in nature appeared in two Supreme Court decisions just prior to *Willingboro*. In *Bigelow v. Virginia*,⁹¹ the Court refused to uphold a law prohibiting publication of an abortion agency's paid advertising of its services and other information on abortion. Following *Bigelow*, the Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁹² that a state ban on advertising of prescription drugs was unconstitutional. Specifically, the Court held that commercial speech is not wholly beyond the protection of the first amendment; however, some restrictions of commercial speech were held to be permissible. Soon after these two decisions in which first amendment protection was extended to the advertisement of abortion services and prescription drug prices, the Court took up the question of whether the first amendment protected real estate advertising in the form of "for sale" signs from municipal regulation.

Willingboro defended its ordinance by arguing that it restricted only one method of advertising and that the ordinance did not entirely prohibit the advertising of real estate.⁹³ The Court did not accept the argument for two reasons: (1) as a practical matter, other advertising methods were more burdensome and costly than "for sale" signs; and (2) the ordinance was not actually concerned with the time, place or manner of the signs but with their effect on people in the neighborhood. To withstand scrutiny, the ordinance had to be based on Willingboro's interest in regulating the content of the advertising, rather than its form or method.⁹⁴

Willingboro also tried to show that its ordinance was based on a com-

⁹⁰ See generally Note, "For Sale" Signs, Blockbusting and the First Amendment: A Tale of Two Cities, 72 NW. U.L. REV. 789-810 (1977); Comment, *Linmark Assocs., Inc., v. Township of Willingboro*, 97 S. Ct. 1614 (1977)—"for sale" signs: The Right to Yell "Fire" in an Integrating Neighborhood?, 7 U. BALT. L. REV. 73-96 (1977); Note, *Commercial Speech, Blockbusting, and the First Amendment: Linmark Associates, Inc., v. Township of Willingboro*, 7 CAPITAL U.L. REV. 271-93 (1977) (*Linmark* reinforces first amendment position without completely removing "for sale" sign bans in promotion of fair housing).

⁹¹ 421 U.S. 809 (1975).

⁹² 425 U.S. 748 (1976).

⁹³ *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. at 93.

⁹⁴ *Id.* at 93-94.

selling governmental interest in promoting racially integrated housing.⁹⁵ The Court agreed that "substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promoting integrated housing."⁹⁶ Nevertheless, it concluded that Willingboro failed to establish that its sign ban was related closely enough to the integration of the community. In a footnote,⁹⁷ the Court observed that in this regard *Barrick v. City of Gary*⁹⁸ was distinguishable because the city of Gary had demonstrated that "for sale" signs had caused panic selling and white flight from Gary. The Court went on to consider whether Willingboro's Township Council could act to prevent its residents from receiving information about sales activity because that information would prompt residents to leave the community. The Court concluded that the ban violated the first amendment because it denied residents information that was neither false nor misleading. That the information could prompt residents to make choices deemed to be, in the view of officials, harmful to the whole community did not justify restriction except in an emergency.⁹⁹ The Court recommended fighting the perceived evil result of the "for sale" signs in front of houses by processes of education and publicity to counter that effect and to create "inducements to retain individuals who are considering selling their homes."¹⁰⁰

In subsequent cases the Court has wavered in its articulation of the commercial speech doctrine. In *Bates v. State Bar of Arizona*,¹⁰¹ the Court struck down a state regulation that prohibited advertising by legal clinics which promoted low-cost services for routine cases. Yet, in *Ohralik v. Ohio Bar Association*,¹⁰² despite the lawyer's claim to first amendment protection, the Court upheld disciplinary action against a lawyer who approached accident victims to solicit business. The Court found that the state had a strong interest in maintaining high professional standards of licensees of the state, as well as a "compelling" interest in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'"¹⁰³ In *Central Hudson Gas v. Public Service Commission*,¹⁰⁴ the Court considered whether a New York Public Service Commission ban on promotional advertising by a utility violated the first amendment. In deciding the ban was unconstitutional, the Court said:

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 95 n.9.

⁹⁸ 491 F.2d 161 (7th Cir. 1974).

⁹⁹ 431 U.S. at 93.

¹⁰⁰ *Id.*

¹⁰¹ 433 U.S. 350 (1977).

¹⁰² 436 U.S. 447 (1978).

¹⁰³ *Id.* at 462.

¹⁰⁴ 447 U.S. 557 (1980).

The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

. . . .

The government may ban forms of communication more likely to deceive the public than to inform it . . . or commercial speech related to illegal activity

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest.¹⁰⁵

From the foregoing, it is reasonable to expect that the Court would not strike down sign bans or other "commercial speaking" where the bans are, as in *Barrick*, closely related to unlawful panic peddling, blockbusting or racial steering.

A recent test of an ordinance that regulates the solicitation of sales listings by real estate agents occurred in Bellwood, Illinois.¹⁰⁶ The village sought to enforce the anti-panic-peddling provision of its fair housing ordinance by requiring real estate firms intending to engage in uninvited solicitation of homeowners for sales listings to submit their plans for approval, in advance, to the Citizen's Advisory Council.¹⁰⁷ Realtors attacking the ordinance claimed first amendment protection and argued that the ordinance imposed prior restraint on their solicitation of business. The district court, citing *Linmark* and *Virginia Pharmacy*, stated that the commercial speech in uninvited solicitation warranted some protection, but stopped short of determining the scope of that protection.¹⁰⁸ The court held that prior restraint regulation required procedural safeguards to reduce the danger of censorship of commercial speech, even though commercial speech does not warrant as much first amendment protection as other types of speech.¹⁰⁹

Considering how carefully the Supreme Court circumscribed its ruling against the Willingboro sign ban, its unwillingness to take away all governmental authority to regulate commercial speech, its repeated assertions

¹⁰⁵ *Id.* at 562-64 (citations omitted). In a concurrence, Justice Blackmun complained that the Court reduced the protection of commercial speech by applying a less strict standard of review than that employed in prior cases, notably in *Linmark*. *Id.* at 573-77.

¹⁰⁶ *Illinois Ass'n of Realtors v. Village of Bellwood*, 516 F. Supp. 1067 (N.D. Ill. 1981).

¹⁰⁷ *Id.* at 1068.

¹⁰⁸ *Id.* at 1069.

¹⁰⁹ *Id.* at 1070-71.

that promotion of integrated housing is a vital public interest and its suggestion that certain factual situations such as those in *Barrick* justify restriction of commercial speech, it is not possible to conclude that real estate sign bans, anti-solicitation ordinances and other measures to stop panic selling in interracial neighborhoods are categorically unconstitutional. The manner and degree to which commercial speech can be restricted apparently depends upon how clear and present the danger of panic selling is, how necessary the restrictions are for stopping it, and how specifically the restrictions apply to the threat of panic selling.

The fourteenth amendment's equal protection clause is currently the subject of much scholarly attention. Neither the Supreme Court nor the commentators have succeeded in providing clarity and coherence to this area of constitutional jurisprudence. Specifically regarding race-conscious affirmative action and its limitations, there are various tendencies suggested but no consensus on principles or guidelines to give direction to lower courts, public officials and the populace.¹¹⁰ The fourteenth amendment generally serves to limit governmental conduct that impinges on the rights and liberties of individuals.¹¹¹ This amendment, along with the thirteenth and fifteenth amendments, was designed to address the grievances of blacks immediately after the Civil War.¹¹² The equal protection clause did not have much prominence in constitutional jurisprudence until the 1960's, when it became an effective weapon against government-supported race discrimination. Under the equal protection clause the Supreme Court closely scrutinized and struck down government conduct that was racially discriminatory. A crucial question, unresolved to date, is how government is permitted to act under the thirteenth, fourteenth and fifteenth amendments to remedy racial discrimination and to correct its damaging effects when these government actions also burden some white and black citizens. In the housing field there have been fourteenth amendment challenges to governmental conduct prohibiting racially diverse residency¹¹³ and a few challenges to governmental conduct preserving racially diverse residency patterns from the

¹¹⁰ One of the more helpful discussions of equal protection jurisprudence is that of Broderick, *The Nature of the Constitutional Process: Equal Protection and the Burger Court*, 12 N.C. CENT. L.J. 320-406 (1981).

¹¹¹ "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹¹² *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872).

¹¹³ See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *appeal dismissed*, 633 F.2d 218 (6th Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1972 (1982); *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972).

likelihood of resegregation.¹¹⁴ Most of the equal protection jurisprudence, however, has been developed in the area of public education and employment, and any guidance as to the impact of the equal protection clause on governmental support of residential integration must be sought in these areas.

An important consideration is that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."¹¹⁵ This requirement was made clear in *Washington v. Davis*¹¹⁶ and reiterated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, where the Court added that disproportionate impact could be taken along with other evidence of racially discriminatory conduct to show an invidious purpose motivating official action.¹¹⁷

Where government actions purposely discriminate against a protected racial class, the standard of review involves strict scrutiny.¹¹⁸ Under the strict scrutiny standard, racial classifications are unconstitutional unless a compelling governmental interest is effectuated by the classification.¹¹⁹ The mere appearance of racial classification in legislation or regulation is enough to trigger strict scrutiny review. Yet when governments have used race-conscious policies and programs to remedy the segregation caused by racial discrimination, strict scrutiny has not always been ap-

¹¹⁴ See, e.g., *King v. Harris*, 464 F. Supp. 827 (E.D.N.Y. 1979), *aff'd mem.*, 614 F.2d 1288 (1979), *vacated on other grounds*, 446 U.S. 905 (1980); *Otero v. New York Hous. Auth.*, 354 F. Supp. 941 (D.C.N.Y.), *rev'd*, 484 F.2d 1122 (2d Cir. 1973).

¹¹⁵ *Arlington Heights*, 429 U.S. at 265.

¹¹⁶ 426 U.S. 229 (1976). This case involved the validity of a test given applicants for positions as police officers in the Washington D.C. Metropolitan Police Department. Use of the test was not found unconstitutional even though there was evidence of a racially disproportionate impact. The Court required a showing of purposeful discrimination to hold a governmental action unconstitutional under the fourteenth amendment. *Id.* at 239-41.

¹¹⁷ *Arlington Heights*, 429 U.S. at 265-68.

¹¹⁸ *Korematsu v. United States*, 323 U.S. 214 (1944) (government confinement during World War II of persons of Japanese ancestry upheld on grounds of compelling public necessity). The change in equal protection doctrine is relatively recent. Before the Warren Court era it was rarely used; and when it was invoked, it focused on the rationality of classifications. The test applied as a standard of review was whether the legislative means was reasonably related to the legislative objective, a rather deferential scrutiny. The Warren Court applied a new, strict scrutiny in certain equal protection cases involving suspect classifications such as race. The two-tier approach to standard of review in equal protection cases prevailed in the 1960's as the number of equal protection claims radically increased. In the Burger Court of the 1970's, discontent with the two-tier approach was registered, and intermediate standards between those of "mere rationality" and strict scrutiny were advanced. But as yet the search for a proper standard of review for equal protection has not emerged. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Broderick, *supra* note 110.

¹¹⁹ See, e.g., *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

plied nor has it been fatal when applied. Mandatory and voluntary school desegregation policies that use race-conscious procedures have been upheld.¹²⁰

The Supreme Court has not conclusively ruled on race-conscious affirmative action to correct the segregation created by racial bias or to prevent imminent resegregation of integrated living patterns. It is not at all certain that the strict scrutiny standard of review is to be applied to those situations where a governmental action seeks to correct the segregative effects of past racial discrimination. In *Regents of the University of California v. Bakke*,¹²¹ Justice Powell applied a strict scrutiny standard in finding that the university failed to carry the burden of showing that the challenged admission policy favoring minorities was necessary to promote a substantial state interest, but stated clearly that race-conscious decision-making by the university could be constitutional.¹²² Justices Brennan, White, Marshall and Blackmun would require strict scrutiny only where official action restricted "fundamental rights" or where a "suspect classification" was apparent. They determined that there were no fundamental rights involved in admission to the University of California medical school and that there was no suspect classification since Bakke, who was white, was not in a class historically disabled by inequality.¹²³ Therefore, they did not apply the strict scrutiny standard, but applied instead a less stringent test: whether race-conscious programs serve to reduce the product of past discrimination.¹²⁴ The remaining justices did not reach the equal protection issue at all.

In *Fullilove v. Klutznick*,¹²⁵ the Court upheld a congressional provision for a ten percent set-aside of a two-billion-dollar public works program for minority businesses, but no majority agreed on a proper standard of review. Chief Justice Burger, joined by Justices White and Powell, used a "close examination" standard involving tests of both ends and means. They found that Congress had the power under the fourteenth amendment to find that traditional construction contracting would perpetuate segregation and to ensure that minority businesses are not

¹²⁰ *Columbus Bd. of Educ. v. Penrick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968). *Parent Ass'n v. Ambach*, 598 F.2d 705 (2d Cir. 1979) upheld a voluntary plan to preserve integration in a school system despite the fact that the plan prevented some black students from attending the school of their choice. The Court applied a strict scrutiny test and found that the preservation of integration was "a sufficiently compelling purpose to justify excluding some minority students from schools of their choice" *Id.* at 719.

¹²¹ 438 U.S. 265 (1978).

¹²² *Id.* at 316-19.

¹²³ *Id.* at 356-62 (Justice Brennan concurring in part and dissenting in part).

¹²⁴ *Id.*

¹²⁵ *Fullilove v. Klutznick*, ____ U.S. ____, 102 S. Ct. 2758 (1980).

denied equal opportunity to participate in federal grants to state and local governments. They found that the means of using racial criteria to remedy the effects of past discrimination were tailored by Congress to achieve that goal.¹²⁶ Chief Justice Burger's opinion emphasized the broad power of Congress to remedy past injustice.¹²⁷ Justice Powell repeated his *Bakke* statement on strict scrutiny and found that Congress could properly have a compelling interest in redressing discrimination against minority contractors and that a race-conscious remedy was equitable and reasonably necessary as a means.¹²⁸ Justices Marshall, Brennan and Blackmun applied the less rigorous review of whether racial classifications were serving an "important" government objective and were "substantially related" to that objective.¹²⁹ Justices Stewart, Rehnquist and Stevens dissented, insisting that any explicit race-conscious classification is unconstitutional.¹³⁰

Voluntary affirmative action in housing has not been reviewed by the Supreme Court. The Second Circuit has faced the issue, however, in *Otero v. New York Housing Authority*.¹³¹ There a housing authority and HUD elected to use race-conscious tenant selection procedures with preference for a limited number of whites in an attempt to prevent a public housing project in a racially diverse neighborhood from becoming exclusively black. This policy was challenged by prospective minority tenants whose access to housing in that project was limited by the tenant selection policy of maintaining integration. The district court had held that the affirmative duty to integrate public housing should not be given effect where it would deprive such groups of available and desirable housing.¹³² The Second Circuit disagreed and reversed on that point, holding that the constitutional and statutory duty to integrate prevails and:

[T]hat the Authority may limit the number of apartments to be made available to persons of white or non-white races, including minority groups, where it can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.¹³³

In *Otero*, the Second Circuit did not analyze the equal protection clause in the context of affirmative action. It stated, however, that the affirmative duty to promote residential integration found in the Federal Fair Housing Act,¹³⁴ and reinforced by statements of purpose in the legislative history,¹³⁵

¹²⁶ *Id.* at ____, 102 S. Ct. at 2775-76.

¹²⁷ *Id.* at ____, 102 S. Ct. at 2771-72.

¹²⁸ *Id.* at ____, 102 S. Ct. at 2775-78.

¹²⁹ *Id.* at ____, 102 S. Ct. at 2796 (Marshall, J., concurring).

¹³⁰ *Id.* at ____, 102 S. Ct. at 2798 (Stewart, J., dissenting).

¹³¹ 354 F. Supp. 941 (D.C.N.Y.), *rev'd*, 484 F.2d 1122 (2d Cir. 1973).

¹³² 354 F. Supp. 941 (D.C.N.Y. 1973).

¹³³ 484 F.2d at 1140.

¹³⁴ See *supra* note 74 and accompanying text.

¹³⁵ 484 F.2d at 1133.

has a constitutional basis, and that Congress's desire to "prevent segregated housing patterns" is not unconstitutional.¹³⁶ It stated further that the authority must justify the denial of public housing opportunities to a family because of race by "convincing evidence" that a color-blind tenant selection policy "would almost surely lead to eventual destruction of the racial integration that presently exists in the community"¹³⁷

Six years later the Second Circuit reviewed *Parent Association v. Ambach*¹³⁸ in which a school district's voluntary plan, which preserved integration in some schools but left others all black, was challenged on equal protection grounds. In discussing the standard of review for official "benign race-conscious activity," the court cited *Otero* as support for its use of "the most exacting form of review for benign race-conscious activity which burdens any members of a minority group."¹³⁹ It cited *Otero* again in concluding that official action to limit some minority group opportunities would be constitutionally permissible upon a showing that such action is essential to promote a racially balanced community and to avoid segregation.¹⁴⁰ In *Otero* and *Ambach* the Second Circuit applied a strict scrutiny standard of review to situations where members of a minority group were burdened by race-conscious affirmative action to preserve integration. The Second Circuit did not make such review fatal to the action where the compelling interest of preserving integration could be shown to be the objective of the action and where officials could show the action to be necessary to achieve that objective.¹⁴¹

There are few clear or consistent clues as to how the Supreme Court would decide a constitutional challenge to affirmative, race-conscious action by local government to preserve residential integration.¹⁴² It is reasonable to conclude, however, that race-conscious action which did not impose direct limits on members of a minority group with respect to specific housing opportunities would be subjected to no more than an intermediate level of scrutiny and possibly a higher level of scrutiny if whites were burdened directly. Where an action did limit access of some minority members to specific housing opportunities controlled by a unit of government, strict scrutiny is virtually certain to be the standard, but this would not be fatal if prevention of segregation was the interest pursued by the government and if the action was necessary to effectuate that interest.¹⁴³

¹³⁶ *Id.* at 1134.

¹³⁷ *Id.* at 1136.

¹³⁸ *Parent Ass'n v. Ambach*, 598 F.2d 703, 717 (2d Cir. 1979).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 719.

¹⁴¹ *Id.* at 721. See also *Benign Steering*, *supra* note 10, at 955-63.

¹⁴² Broderick, *supra* note 110.

¹⁴³ It is important to note that in the cases on affirmative action in college

IV. POLICIES AND PROGRAMS

It was pointed out above how interracial neighborhoods and communities that did not take deliberate and strong action to protect and preserve their integrated residential patterns were likely to lose them to resegregation.¹⁴⁴ Suburban examples in the Chicago, Cleveland, Cincinnati, Detroit and St. Louis areas illustrate that resegregation is not something restricted to large cities.¹⁴⁵ Having considered the law that is most likely to be used to limit attempts to maintain interracial residency, let us consider some of the counter-measures being used by municipalities in interracial communities.

Policies and programs designed to maintain racial diversity vary in many respects. Likewise, housing market conditions and other circumstances differ from place to place. No one model or strategy fits all situations. Many policies and programs are measures to investigate violations of fair housing law; many are marketing efforts to persuade homeseekers to make choices that favor residential integration or reduce present or potential segregation; others impose limits on marketing activities which favor segregation. Cases such as *Linmark*, *Barrick*, and *Otero* illustrate that when residential integration programs are challenged, courts are inclined to judge their validity only with regard to the very specific facts of the case. In no case has a universally applicable formula been provided to show a proper ratio between necessity on the one hand and permissible intrusion to achieve and maintain racially integrated housing on the other. Weighing the community interest in remaining interracial against the costs of the efforts needed to resist the practices and conditions that compel resegregation is, as yet, a case-by-case process.¹⁴⁶

admissions (e.g., *Bakke*), minority business set-asides (e.g., *Fullilove*), public housing tenant selection (e.g., *Otero*) or site selection (e.g., *King v. Harris*) and public school pupil assignment (e.g., *Ambach*), the factual situation is qualitatively different from the normal municipal government situation where the housing market, and the opportunities in that market, are not in the control of the municipality and are always changing due to factors not within government control. Government is in direct control of medical school admissions at state universities, of assignment of public school pupils to classrooms and of site or tenant selection in public housing. It is clearly *not* in control of the private housing market which provides housing to nearly all the citizens in most communities. Affirmative actions to promote open and integrated housing in the private sector housing market generally rely on persuasion of homeseekers because direct municipal control is out of the question.

¹⁴⁴ See *supra* Section I.

¹⁴⁵ H. OBERMANN, STABILITY AND CHANGE, *supra* note 4, at 9.

¹⁴⁶ Note that the Second Circuit in *Otero* found that the governmental mandate to maintain integrated housing patterns for the benefit of the whole community outweighed the interest of some minority group public housing tenants in having priority access to housing units in a neighborhood in danger of resegregation. *Otero v. New York Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973). The Seventh Circuit in *Barrick* found that the governmental interest in encouraging stable,

Because no two sets of circumstances are alike, the same program may be valid in one place but not in another. The following section offers some examples of programs to protect racial diversity. The validity of these programs and the policies they embody must be measured in the context of the conditions in which they are used.

A. *Knowledge of Conditions and Changes*

It is very important for an interracial community to investigate conditions in the housing market and to monitor racial change. Its ability to plan, implement and evaluate effective programs to reach fair housing objectives is dependent on accurate knowledge of what is going on. Its capacity to justify the necessity and validity of those programs depends on possession of reliable information.¹⁴⁷ The only way a community can know if or how seriously it is threatened by resegregation is to study what is changing and the rate of change.¹⁴⁸ The only way to show that discriminatory conditions and practices are causing the threat is to investigate and obtain the evidence.^{148.1}

Knowledge about the racial composition of neighborhoods is obtainable in fairly precise, quantitative terms; but it is not always easy to obtain up-to-date information. The United States Census Bureau reports on the population by race and location every ten years. Special census surveys may be commissioned at other times. Vital statistics have been used to estimate the racial composition of census tracts on an annual basis.¹⁴⁹

integrated communities by banning "for sale" signs outweighed any minor inconvenience in having to use alternative methods of advertising. *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974). Note also that the Supreme Court in *Linmark* was careful to leave *Barrick* untouched by its ruling that the township of Willingboro failed to demonstrate the necessity of its sign ban as the city of Gary had done, *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

¹⁴⁷ The village of Park Forest, Illinois, for example, commissioned a substantial review of its integration maintenance programs which not only documented need, but also showed the validity of the programs. L. HEUMANN, *supra* note 11.

¹⁴⁸ In some instances all-white communities that are fearful of any racial diversity may overreact when slight racial change occurs. Therefore, accurate information is not only useful to justify and plan protective programs; it may also be useful in calming unfounded fear and hysteria exhibited by whites.

^{148.1} The importance of good demographic and economic data is seen in *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 493 F. Supp. 1225 (S.D.N.Y. 1980), where a publicly assisted housing project unsuccessfully defended a discrimination charge. The court found that *Otero* did not aid this defendant because it lacked evidence showing that use of a quota was necessary to prevent segregation. *Id.* at 1249-50.

¹⁴⁹ The Cuyahoga Plan of Ohio studies racial composition and change in the Cleveland area on an ongoing basis. It publishes the number of births by race and an estimate of the racial composition and annual percent change for each census tract in the metropolitan area. See THE CUYAHOGA PLAN OF OHIO, A REPORT ON POPULATION AND RACE: ESTIMATE OF RACIAL COMPOSITION OF CEN-

School enrollment reports to state and federal agencies are also useful where pupils are assigned to schools on a neighborhood basis.¹⁵⁰ By using one or more of these methods, a community can obtain racially sensitive statistical evidence about conditions and changes in its housing market.

The most common method of gathering information about housing market practices in interracial communities has involved auditing real estate firms by using persons who pose as homeseekers to observe and report their own experience in the marketplace.¹⁵¹ This technique is also used to investigate allegations of racial discrimination by specific rental or sales agents made by actual homeseekers. A community sensing that it is a victim of racially discriminatory real estate practices may audit on a larger scale for racial steering or other illegal practices.¹⁵² Most of the municipalities trying to maintain integration against the likelihood of resegregation have used testing in audits to document illegal practices and, in many cases, the evidence has been used to sue real estate firms.¹⁵³ Testing was used in a national study financed by HUD which showed that racial discrimination in housing was prevalent in all parts of the country.¹⁵⁴ Unless a more efficient and reliable method of reporting real

SUS TRACTS AND POPULATION DATA FROM THE 1980 CENSUS (1981) (available at the office of the Cuyahoga Plan in Cleveland, Ohio).

¹⁵⁰ See, e.g., THE CUYAHOGA PLAN OF OHIO, RACIAL SCHOOL ENROLLMENT PATTERNS IN METROPOLITAN CLEVELAND, 1978-1980 (1981) (on file in the office of the Cuyahoga Plan in Cleveland, Ohio).

¹⁵¹ The effectiveness and legality of such testing has been affirmed in numerous courts. *Hamilton v. Miller*, 477 F.2d 908, 908 n.1 (10th Cir. 1973) (indicating need for testing to gather evidence of racial discrimination); *Zuch v. John H. Hussey Co.*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (per curiam) (case based primarily on evidence from testing); *United States v. State of Wisconsin*, 395 F. Supp. 732 (W.D. Wis. 1975) (state law against testing found to violate Federal Fair Housing Act); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643 (N.D. Cal. 1972), *modified as to relief and aff'd*, 509 F.2d 623 (10th Cir. 1975) (experience of testers uniformly admitted to show existence of discriminatory policy). Testers were found to have standing to sue as members of a community victimized by racial steering, in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and when given misinformation about the availability of dwelling units, in *Havens Realty Corp. v. Coleman*, ___ U.S. ___, 102 S. Ct. 1114 (1982). Testing requires that minority and non-minority testers, matched as to pertinent factors, seek information or service from the same housing provider. By comparing their experiences with regard to availability, terms, or other factors that determine the likelihood of obtaining the housing in question, unlawful discrimination which interferes with the right to a housing opportunity can be discovered.

¹⁵² See, e.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D. Wis. 1980).

¹⁵³ *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). See also H. OBERMANN, A GUIDE, *supra* note 26.

¹⁵⁴ DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY (1979).

estate rental and sales practices is developed, interracial municipalities and other communities wanting to determine the existence or extent of racial discrimination in sales and rental practices will need to rely on auditing programs using testers.

Some communities obtain housing market data from recent homebuyers.¹⁵⁵ Homebuyers who may not be aware of illegal activities such as racial steering or mortgage redlining may relate experiences which when analyzed show evidence of illegal or unfavorable practices in the housing market. Studies of mortgage or insurance underwriting practices are somewhat complex, but these too have shown that lending practices discriminated against interracial neighborhoods.¹⁵⁶ Information about unwanted solicitation of listings by real estate sales firms or other types of blockbusting may also be obtained by surveys or questionnaires to homeowners.

Studies of real estate advertising in newspapers and magazines have documented discriminatory practices in the use of fair housing or equal opportunity logos.¹⁵⁷ The use of human models in real estate advertising has been shown to reinforce perceptions of segregated housing patterns in ways which are detrimental to interracial areas.¹⁵⁸

¹⁵⁵ The Heights Community Congress in Cleveland Heights, Ohio, surveys new homebuyers in Cleveland Heights each year and issues a report. This study is financially supported in part by the City of Cleveland Heights. Similar surveys are conducted by the cities of University Heights and Bedford Heights, Ohio.

¹⁵⁶ R. AVERY and T. BUYNAC, MORTGAGE REDLINING: SOME NEW EVIDENCE 18, 30 (1981) (Federal Reserve Bank of Cleveland Economic Review). Considerable study of mortgage lending in the Cleveland area has been done by the Northeast Ohio Areawide Coordinating Agency and of racial bias in lending by the Cuyahoga Plan. The study by Avery and Buynak cited above includes data originally developed by the other two agencies.

¹⁵⁷ The Cuyahoga Plan made such a study in 1979 and found that most firms did not use fair housing logos in advertising. Those that did use such logos were inconsistent in doing so. Significantly, some firms used the logo in ads on homes in racially diverse areas while leaving it out of ads on homes in exclusively white areas. See also *United States v. Real Estate One*, 433 F. Supp. 1140 (E.D. Mich. 1977) (a housing bias case in which advertising practices were a significant issue); C. RENDE, FAIR HOUSING/UNFAIR ADVERTISING PREFERENCE, LIMITATION, DISCRIMINATION: A STUDY OF NEWSPAPER DISPLAY ADVERTISING FOR NEW SALES HOUSING IN METROPOLITAN WASHINGTON, D.C., 1972-1975 (Metropolitan Washington Planning and Housing Assoc., Washington, D.C., 1977).

¹⁵⁸ The Cuyahoga Plan made a study of the use of human models in real estate advertising in 1981. The Cuyahoga Plan found no use of minority group images in real estate advertising and further found other evidence that real estate advertising in the Cleveland area reinforced the perception of racially segregated housing markets.

Guidelines for affirmative marketing have been promulgated by the United States Dept. of HUD, 24 C.F.R. § 109 (1982). These guidelines are directed to developers or managers of federally assisted housing and are meant to indicate the criteria HUD uses in monitoring compliance with the requirement of recipients of assistance to "affirmatively further" fair housing. 42 U.S.C. §§

Interracial communities need knowledge of housing market conditions in *all* of the housing market in a metropolitan area, not only in their own part of it. Comparisons of advertising, financing, salesmanship, appraisal and other aspects of housing transactions between interracial and exclusive neighborhoods are possible only if racially sensitive data is available over a large area. Even though interracial areas are a small fraction of an entire metropolitan housing market, it is the entire market that should be the object of investigation and monitoring.

B. *Local Legislation and Policy Statements*

Fair housing ordinances and program development are more likely to pass the tests of effectiveness and legal validity when based on findings and declarations by a public body that they are necessary. A resolution or declaration of findings may cover several elements: (1) assertion of the municipality's dependence on "stable, integrated and balanced living patterns";¹⁵⁹ (2) recognition that racially discriminatory conditions and conduct actually present in the housing market threaten integrated and balanced living patterns, and violate the rights of individuals to choose where to live; (3) recognition that racial discrimination in the housing market contributes to the loss of residential integration and to the formation and preservation of segregated neighborhoods, thereby depriving citizens of the benefits of interracial associations; and (4) assertion that the municipality's purpose is to eliminate discriminatory and unlawful housing practices that limit choice and further segregation, and to affirmatively promote stable, racially diverse residential patterns.¹⁶⁰

Public actions have political consequences. Some public officials may not have constituencies that will support straightforward action against racial discrimination or affirmative protection of residential integration. In some cases, elected officials make only very general statements, or a commission is established which in turn issues statements of fair housing advocacy.¹⁶¹ Another problem may occur when public policy statements recount in detail statistical data or descriptions of panic selling and flight by whites so forcefully that the statements erode confidence and cause flight. Public policy makers supporting integration have the difficult task of clearly stating that the jurisdiction must act to protect itself while avoiding statements that declare disaster so imminent that residents are given reason to lose confidence in the future of their neighborhood or community.

3608(e)(5), 3609 (1976). HUD seldom monitors those expected to comply and is not known to enforce its guidelines.

¹⁵⁹ See, e.g., NORTHERN ILLINOIS PLANNING COMMISSION, FAIR HOUSING ORDINANCES: A GUIDE FOR LOCAL OFFICIALS 17 (1981).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* See also H. OBERMANN, A GUIDE, *supra* note 26, for examples of municipalities with policy statements.

Almost all municipal fair housing ordinances prohibit racial discrimination in the sale or rental of housing. In many cases there is a deliberate attempt to duplicate the prohibitions stated in Title VIII, and in some cases, patterning after federal law may qualify a municipality for special grants to enforce the law.¹⁶² Such patterning also brings to citizens the advantage of using local courts which may be more convenient and less costly than federal courts. On the other hand, federal court enforcement is almost always preferred by plaintiffs in fair housing litigation because it is stronger, more independent of local hostility to fair housing and provides broader remedies.¹⁶³

Policy statements and enactments establishing programs in favor of maintaining integrated housing patterns and forestalling resegregation have been added to local ordinances in relatively few municipalities. Where they have been added¹⁶⁴ the legislature is wise to state and support carefully the necessity of the action, because it may be challenged. Challenges, particularly those from the organized real estate industry, are generally based on a perception of integration maintenance efforts that ignores the

¹⁶² The United States Department of Housing and Urban Development's Fair Housing Assistance Program makes small grants to state or local jurisdictions for fair housing enforcement. To be eligible to receive a grant, the state or local jurisdiction must have fair housing legislation which HUD considers "substantially equivalent" to Title VIII. Fair Housing Assistance Program, 24 C.F.R. § 111 (1982).

¹⁶³ Municipal governments faced with serious violations of fair housing law have in the past obtained the help of the United States Department of Justice or, like Bellwood, Illinois and Cleveland Heights, Ohio, have gone to federal court themselves. In some cases, however, local ordinances and remedies serve as smoke screens limiting the use of more effective federal law. *See, e.g.,* OHIO DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT, OHIO HOUSING ELEMENT, 1978 10-6. Local ordinances that would require victims of racial discrimination to negotiate and conciliate with respondents instead of, or as a condition of, litigation are particularly suspect. The State of Ohio's Fair Housing Law has been rarely used to protect victims of housing discrimination because of its ineffectual enforcement provisions. OHIO REV. CODE ANN. § 4112.02(H) (Page 1980).

¹⁶⁴ *See, e.g.,* Village of Bellwood, Illinois, Fair Housing Ordinance (Sept. 23, 1981); Resolution 228 Adopting a Policy Statement on Racial Diversity in Matteson, Illinois (Sept. 4, 1979); Maintaining Diversity in Oak Park (a policy statement adopted by the President and Board of Trustees of the Village of Oak Park, Illinois) (April 11, 1977). A resolution adopted by the city of Cleveland Heights, Ohio reads as follows:

A resolution committing the City Council to a renewed and expanded comprehensive program to promote the City of Cleveland Heights as a well-maintained, full service residential community, to prevent racial resegregation, and to foster an increased joint effort with Cleveland Heights residents, community organizations, the Board of Education, the business community, and other institutions in the development and implementation of the described program.

City of Cleveland Heights, Ohio, Resolution 26-1976 (March 15, 1976) (Revised 1979).

conditions and practices that make them necessary, and is unsympathetic to the moral, practical or legal considerations which make them desirable.¹⁶⁵

C. Controlling Unfavorable Real Estate Practices

It is generally true that interracial communities consider attitudes and practices in the real estate business to be the most significant factors threatening residential integration.¹⁶⁶ Proponents of integrated housing point to a long tradition of racial discrimination in the real estate industry, to the opposition by the real estate industry to fair housing laws, to the continued segregation of sales staffs and to the prevalence of racial discrimination in real estate sales and rental practices.¹⁶⁷ Usually a municipality seeking to protect its integrated residential patterns will try to prevent unfavorable real estate practices.

Litigation is a common strategy to control illegal real estate practices. In the past, litigation was usually brought by private parties or community organizations. In the 1970's, municipalities began to cooperate with community groups conducting investigations.¹⁶⁸ More recently, municipal governments themselves have become plaintiffs enforcing the fair housing laws against real estate firms engaging in illegal practices.¹⁶⁹ While

¹⁶⁵ AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 2-6. There is some recent evidence of division within the organized real estate industry. When the Cleveland Area Board of Realtors announced its support of a lawsuit attacking the fair housing and integration maintenance policies of the city of Cleveland Heights (Smith v. City of Cleveland Heights, C 80-1695 (N.D. Ohio, filed Sept. 12, 1980), a number of realtors doing business in Cleveland Heights took exception in public to the action, expressing their support of the city. When the lawsuit was filed, the mayor of Cleveland Heights was a prominent realtor and former president of the Cleveland Area Board of Realtors. *Some Realtors Back Cleveland Heights in Suit*, Cleveland Press, Sept. 22, 1980, at A6, col. 1.

¹⁶⁶ AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 2-6. See also H. OBERMANN, A GUIDE, *supra* note 26. Many of the communities whose programs are described in this guide identify real estate practices and the resistance of the organized real estate industry as the major obstacle to stable residential integration. See also CENTER FOR COMMUNITY CHANGE, RESPONSE TO CRISIS: A STUDY OF PUBLIC POLICY TOWARD NEIGHBORHOODS AND FAIR HOUSING 10 (1980).

¹⁶⁷ See AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 2-6; H. OBERMANN, A GUIDE, *supra* note 26; CENTER FOR COMMUNITY CHANGE, RESPONSE TO CRISIS: A STUDY OF PUBLIC POLICY TOWARD NEIGHBORHOODS AND FAIR HOUSING 10 (1980).

¹⁶⁸ The South Suburban Housing Center near Chicago investigates housing discrimination for several suburbs including Park Forest, Chicago Heights and Park Forest South. The City of Cleveland Heights, Ohio and the Heights Community Congress cooperate in investigation of housing discrimination in that city. Community based organizations and municipalities receiving Community Development Block Grants cooperate to investigate housing discrimination in an alliance strongly encouraged by HUD.

¹⁶⁹ AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 16. The City of Cleveland Heights, Ohio has also taken a real estate firm to federal court. Heights Com-

the efficacy of litigation as a means of opening racially exclusive areas is debatable, litigation to stop illegal steering, blockbusting, lending or insurance "redlining" and other housing market practices in interracial areas has been more successful. Experience indicates that a municipality wanting to maintain integrated residential patterns must be prepared to use litigation as one means of controlling racially segregative real estate practices.

Some municipalities also employ legislation to regulate unfavorable real estate practices. Two common types of regulations are controls on the use of "for sale" signs and controls on direct solicitation for real estate sales listings. "For sale" signs and direct solicitation are real estate practices closely associated with blockbusting, although they are also common in racially exclusive areas as well. Persons who have once experienced panic selling in their neighborhood are usually convinced that any solicitation, even when no racial remarks are made to induce the listing, is a scare tactic.¹⁷⁰ This is particularly true when telephone or door-to-door solicitation intensifies just as the proportion of minority homebuyers begins to increase.

In some municipalities *all* signs are banned from front yards or on residential property. These bans have not been successfully contested. Bans of "for sale" signs, however, may be subject to the test of compelling interest, set forth by the Supreme Court in *Linmark*, for curtailing commercial speech. There must be evidence of conditions necessitating the ban. It must be clear that the ban is an effective and necessary response to those conditions. The curtailment of the commercial speech of the real estate firm, which is given at least some first amendment protection, must be justified by both a governmental interest in reaching the objectives of "truly integrated and balanced living patterns" and the necessity of a ban of "for sale" signs in pursuit of that interest.¹⁷¹

Anti-solicitation ordinances may be more effective in controlling panic selling than "for sale" sign bans.¹⁷² If many persons in a neighborhood all at once offer their houses for sale coincidentally with an increase in the proportion of minority population, there is an unfavorable market con-

munity Congress v. Hilltop Realty C 79-422 (N.D. Ohio, filed March 7, 1979). For excerpts of testimony of Heights Community Congress checkers and HGM-Hilltop real estate agents, see Saul, *Credibility is Attacked in Housing Trial*, The Plain Dealer (Cleveland), Feb. 20, 1983, at A25, col. 5; Farkas, *Checkers Recall Racism*, The Plain Dealer (Cleveland), Feb. 27, 1983, at A32, col. 1.

¹⁷⁰ See Miller, *Scare Tactics Resegregating a Cleveland Neighborhood*, The Plain Dealer (Cleveland), June 7, 1980, at B7, col. 1.

¹⁷¹ *Linmark Assocs., Inc. v. Township of Willingboro*, 535 F.2d 786 (3d Cir. 1976), *rev'd*, 431 U.S. 85 (1977) and *supra* text accompanying notes 67-85.

¹⁷² The ban on "for sale" signs reduces the *appearance* of panic in a neighborhood when many houses are put on the market at the same time. Preceding the evidence of panic manifested in the signs is the reality that owners have listed homes for sale. A ban on solicitation of listings for sale is much closer to the heart of the problem of panic peddling and white flight.

dition even without "for sale" signs. Some municipalities have sought to limit direct solicitation for real estate listings as a means of preventing panic selling.¹⁷³

There are two basic types of anti-solicitation ordinances. One type, exemplified by the Bellwood, Illinois ordinance, requires the soliciting real estate firm to get a permit to solicit door-to-door, by mail or telephone.¹⁷⁴ Anyone intending to solicit for real estate listings must file a notice of intent specifying who is doing the solicitation, what residences or areas will be solicited, when the solicitation will occur, and where the solicitor has solicited within the previous six months. Material to be distributed also must be submitted. This information is reviewed by a village official who determines whether, according to established criteria, the proposed solicitation would occur in or near an area of housing market instability and whether the solicitor is in compliance with federal, state and local fair housing law. This type of anti-solicitation ordinance has the advantage of: (1) requiring thoughtful planning by real estate firms in advance of solicitation; and (2) informing the municipality of exactly where and when solicitation will take place so that it can monitor and direct its own communication to residents.

The second type of anti-solicitation ordinance is exemplified by the Cleveland Heights, Ohio ordinance.¹⁷⁵ It establishes a means by which homeowners can communicate to real estate firms their wish not to be solicited. The city maintains a list of owners who have filed a request that they not be solicited to put their home up for sale and periodically sends the list to real estate firms. Any solicitation of a homeowner who has filed such a request by a real estate agent is unlawful under the ordinance. Real estate agents who intend to solicit door-to-door, by telephone or mail must check the list to determine which owners may lawfully be solicited. By placing the initiative in restricting the communication with the homeowner, this latter type of anti-solicitation ordinance seems less vulnerable to attack on first amendment grounds. The effectiveness may be less certain since it depends on vigorous community involvement to inform homeowners of their right to freedom from undesired solicitation by real estate agents. Enforcement also depends on the initiative of individual residents to first file their request and then to file complaints of unlawful solicitation.

Municipalities that enact any legislation to control real estate practices usually incorporate the prohibitions against discrimination detailed in Title VIII. This does at least two things: (1) it states the municipality's commitment to enforcement of anti-discrimination measures; and (2) it pro-

¹⁷³ Solicitation of listings through media advertising has not been prohibited by municipal ordinances although the *content* of such advertising is subject to the prohibition against discrimination in 42 U.S.C. § 3604(e) (1976).

¹⁷⁴ Village of Bellwood, Illinois, Fair Housing Ordinance, § 14 (Sept. 23, 1981).

¹⁷⁵ Cleveland Heights, Ohio, Ordinances, Ch. 749.04 (1976) (Revised 1979).

vides a local mechanism for enforcement. Another benefit of incorporating the federal fair housing policy at the local level is that it is likely to encourage real estate salespersons to consider fair housing issues more seriously. In other words, it has the same controlling or deterrent effect as having a policeman walk a beat in an area where crime is likely to occur.

D. *Affirmative Action Strategies*

Municipal affirmative action is, in most instances, an essential part of the effort to maintain integrated residential patterns.¹⁷⁶ In contrast to the restrictive and mandatory character of "for sale" sign bans and anti-solicitation ordinances, most affirmative action measures in housing are voluntary and permissive in character, offering and expanding choices for residents, homeseekers and the real estate industry.

The most common affirmative action policies and programs are those that have a marketing character. There are various types of affirmative marketing.¹⁷⁷ There is affirmative marketing required in federal regulations for federally assisted housing programs which directs the advertising and tenant selection policies.¹⁷⁸ There is affirmative marketing embodied in a voluntary agreement between the National Association of Realtors and HUD which suggests some practices realtors might voluntarily adopt to assure compliance with fair housing laws.¹⁷⁹ There is also affirmative marketing embodied in the programs of municipalities and community groups seeking to reduce segregation and increase racial diversity.

Municipalities that have affirmative marketing programs nearly always develop them as a means of correcting deficiencies in the housing market.¹⁸⁰ These programs are implemented in reaction to the effects of past racial discrimination as an antidote to traditional practices in the commercial housing market which perpetuate segregation. The affirmative marketing

¹⁷⁶ AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 2.

¹⁷⁷ Affirmative action in housing refers generally to deliberate efforts to stop or prevent any prohibited discrimination, to correct the effects (e.g., segregated residential patterns) of past discrimination or to sustain a stable, integrated housing market or pattern. Affirmative marketing as a specific type of affirmative action refers to deliberate efforts in the housing market or by those in the housing marketing business to reach one or more of the objectives of affirmative action in housing.

¹⁷⁸ Fair Housing Advertising, 24 C.F.R. § 109 (1982).

¹⁷⁹ That agreement was made in 1975. For an explanation of it, see NATIONAL ASSOCIATION OF REALTORS, AFFIRMATIVE MARKETING HANDBOOK (1977). The voluntary affirmative marketing agreement may be endorsed by area boards of realtors and then by individual firms who are members of the board. Realtors consider that their agreement is a voluntary choice, as is abiding by the provisions in the agreement.

¹⁸⁰ H. OBERMANN, A GUIDE, *supra* note 26; AFFIRMATIVE ACTION IN HOUSING, *supra* note 4.

activities are race-conscious efforts to attract to a neighborhood or community members of racial groups that are absent from or unlikely to be attracted to that area and whose presence in the housing market is necessary to assure racial diversity in the market. Specifically, the activities must draw the attention of white homeseekers to interracial areas that are likely to resegregate due to a lack of interest from whites, while drawing the attention of minority group homeseekers to areas they are least likely to be shown or encouraged to consider by traditional real estate practices.¹⁸¹ An important characteristic of the affirmative marketing definition used by most municipalities and community organizations is that it expands locational choice and adds opportunities.¹⁸²

Opponents of race-conscious affirmative marketing charge that it constitutes racial steering and is unlawful under Title VIII, section 3604.¹⁸³ Unlawful racial steering has been defined by courts, local ordinances and statutes as words or actions of real estate salespersons.¹⁸⁴ As noted earlier, the language of sections 3603 and 3604 and judicial interpretations suggest that the conduct most subject to prohibition is commercial conduct by those engaged in the business of selling or renting dwellings.¹⁸⁵ In addition, the current definitions of unlawful racial steering¹⁸⁶ assume that

¹⁸¹ See, e.g., J. WUNKER, W. SCOTT, D. DEMARCO, and D. ONDERDONK, *supra* note 29, at 1-9; H. OBERMANN, A GUIDE, *supra* note 26 (specifically sections in Oak Park, Ill. and University City, Mo.).

¹⁸² When municipal or private open housing information centers attempt to expand the interest of minority homeseekers in areas that are predominantly or exclusively white, they are accused by their adversaries of "diverting" or discouraging those homeseekers from interracial areas. The open housing centers do not see themselves as replacing the traditional housing market which would most likely not seek to interest minority homeseekers in a location not already interracial; they see themselves instead as a supplemental service that compensates for deficiencies in the traditional market. See, e.g., AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 14-18; Pick, *Is Fair Housing Fair?*, 23 STUDENT LAW. 42 (May 1982).

¹⁸³ 42 U.S.C. § 3604 (1976).

¹⁸⁴ Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 110 (1979); United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Zuch v. John H. Hussey Co., 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1976) (per curiam).

¹⁸⁵ See *supra* note 56 and 57 and accompanying text.

¹⁸⁶ The United States Supreme Court has defined racial steering as "directing prospective home buyers interested in equivalent properties to different areas according to their race." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979).

Illegal steering is subtle, often an unintentional product of real estate practices that ignore the existence of segregation and the effect of continuing practices developed when racial discrimination was an ethical duty in the real estate business. It can be very difficult to prove in court. See Village of Bellwood v. Dwayne Realty, 482 F. Supp. 1321 (N.D. Ill. 1979).

In 1981 the Village of Bellwood, Illinois defined illegal steering as:

[i]nfluencing or attempting to influence a person by any words or acts in connection with viewing, buying or leasing of real estate, so as to

it *limits* housing opportunity while race-conscious affirmative marketing *expands* choice.¹⁸⁷ Finally, the most current definitions of racial steering limit unlawful conduct to that which would perpetuate segregated residential patterns or destroy integrated residential patterns.¹⁸⁸ Considering the purpose of the Fair Housing Act and the definition of illegal racial steering, it is difficult to see how affirmative efforts to encourage consideration of housing opportunities which would reduce segregation could be a violation of section 3604 of Title VIII.

One type of affirmative marketing is advertising by an interracial community to project to prospective homebuyers or renters a favorable image of the community.¹⁸⁹ Advertising is sometimes used to counter the myth

promote, or tend to promote, the continuance or maintenance of segregated housing, or so as to retard, obstruct or discourage integrated housing on or in any street, block or neighborhood of the municipality. Village of Bellwood, Illinois, Fair Housing Ordinance (Sept. 23, 1981). This wording is nearly identical to that in the Illinois Real Estate Brokers and Salesman License Act, ILL. REV. STAT. ch. 3, §§ 5701-43 (1973).

The Cleveland Area Board of Realtors published a statement defining unlawful steering which is introduced as follows:

Unlawful steering may be defined as restricting or attempting to restrict the choices of a person by words or conduct in connection with seeking, negotiating for, buying or renting a dwelling as to [sic] perpetuate, or tend to perpetuate, racially segregated housing patterns, or to discourage or obstruct racial [sic] integrated housing patterns in an inter-racial neighborhood or community.

A Statement of Unlawful Steering, THE CLEV. REALTOR 7 (Nov. 1982).

¹⁸⁷ Realtors who oppose the affirmative actions of municipalities and private organizations that operate housing information programs designed to inform homeseekers of housing choices and promote racial integration accuse the open housing programs of "benign steering," "reverse steering" or "integration steering," claiming (1) that these programs do in fact steer homeseekers and (2) that any steering is illegal regardless of the effect. The open housing advocates reply that expanding choices and opportunities does not prevent or limit anyone's choices or right of access to housing offered in the housing market, a question of fact, and that urging people to consider the benefits of reducing segregation or increasing integration in their residential choices is not only permitted by law but is encouraged by national public policy, a question of law. See *Smith v. City of Cleveland Heights*, C 80-1695 (N.D. Ohio, filed Sept. 12, 1980); AFFIRMATIVE ACTION IN HOUSING, *supra* note 4, at 21-22; Pick, *supra* note 182.

¹⁸⁸ The debate about steering is especially difficult because so many different terms are being used (e.g., benign steering, reverse steering, integration steering, restrictive steering, racial steering), and there are no universally accepted definitions of these terms, nor is it clear that they all have distinct meanings. Finally, there is a lack of agreement as to what is illegal—the act of influencing, or influencing so as to effect a predictable, segregative result. Perhaps the lack of linguistic tools to discuss the issues contributes to the slowness of progress in removing racial discrimination in housing.

¹⁸⁹ Advertising is an important component of several municipalities' programs, including those of Shaker Heights and Cleveland Heights, Ohio; Southfield and Oak Park, Mich.; Bloomfield, Conn.; and Park Forest, Park Forest South and Oak Park, Ill. H. OBERMANN, A GUIDE, *supra* note 26.

that interracial communities are not desirable places for white homebuyers to move to. The promotion of interest in a community through advertising also helps maintain a high level of demand in the community's housing market. This is especially important where white flight is a problem.

Housing information services are often provided in interracial communities. Shaker Heights and Cleveland Heights, Ohio; Oak Park, Illinois; and University City, Missouri, are among the cities supporting substantial information services for individual buyers and renters.¹⁹⁰ While the several existing services follow slightly different procedures from place to place, they generally operate to provide information to individual homeseekers about the community, its neighborhoods, its facilities, schools, programs, the municipal government and the housing market. Statements of objectives often emphasize that the housing service has been set up to encourage pro-integrative housing choices because of the segregative tendencies in the real estate business.¹⁹¹ In some instances housing offices encourage black and white homeseekers to consider all neighborhoods equally; in other situations, where the residential pattern is highly segregated, housing services urge buyers and renters of all races to consider those neighborhoods where their choice would not contribute to segregation. In a few cases, service is not made available to whites considering only predominantly white areas or to blacks considering only interracial or predominantly black areas.¹⁹² While some housing services take an active role in referring homebuyers to listing brokers or owners who advertise homes for sale,¹⁹³ most services neither take listings from sellers nor "show" specific homes to buyers. What they aim to provide is information about types of housing opportunities and an enthusiastic introduction to the community in which those opportunities exist, in accordance with their mission to encourage racial diversity.

Along with affirmative marketing, several communities sponsor special educational programs for real estate firms.¹⁹⁴ Real estate firms are invited to participate in seminars, workshops, briefings and other educational projects designed both to inform agents about the community and promote a positive perspective on interracial living. In Southfield, Michigan and Cleveland Heights, Ohio, real estate firms are invited to formally pledge their support for the cities' goals of open housing and integrated residential patterns. In effect, the real estate firms and agents

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., *Policy Statement on Maintaining Racial Diversity*, Oak Park, Ill. in H. OBERMANN, A GUIDE, *supra* note 26.

¹⁹² This is the practice of the Housing Information Service of the Cuyahoga Plan of Ohio in Cleveland.

¹⁹³ See the reports on Southfield, Mich., Cleveland Heights, Ohio, Bloomfield, Conn., University City, Mo. and Oak Park, Ill. in H. OBERMANN, A GUIDE, *supra* note 26.

¹⁹⁴ See the reports on Bloomfield, Conn., Oak Park, Ill. and Cleveland Heights, Ohio in H. OBERMANN, A GUIDE, *supra* note 26.

that choose to participate become partners with the cities in affirmative marketing.¹⁹⁵

An important type of municipal affirmative action in housing is a community relations program. Many municipalities form community relations commissions or departments which have a variety of functions.¹⁹⁶ In some cases they concentrate on enforcement of fair housing ordinances. Elsewhere the focus is on sustaining good race relations, providing educational programs or sponsoring community improvement projects. Still others do studies, hold hearings and recommend public policy. The encouragement of broadly based and high level community involvement is often an important means of preventing white flight in newly integrated neighborhoods. It may also help minority individuals enter civic life. Affirmative efforts to promote interracial community involvement by citizens play an important role in the strategy of maintaining integrated residential patterns by reducing divisiveness along racial lines.

There are important differences between programs to stop or prevent unfavorable real estate practices, on the one hand, and affirmative marketing activities on the other. Bans controlling "for sale" signs, permits for solicitation or other types of regulation of real estate commerce are *intrusive* and require a clear and strong justification in order to fall within a first or fourteenth amendment framework. Affirmative marketing, in contrast, is *permissive*. It aims to attract and influence housing consumers and providers in a manner favorable to residential integration. The consumer may indeed choose not to use a housing service and yet is not cut off from buying or renting dwellings; the real estate firm may choose to ignore a city's invitation to participate in its program since participation is not a legal requirement. While a municipality may allocate its informational services to take into account racially discriminatory conditions in the housing market, affirmatively marketing its service does not limit or close off the number of homes for sale or apartments for rent in the private market. In this respect, affirmative marketing is a much different type of affirmative action than the affirmative action in higher education or employment, where a limited number of admissions or jobs are allocated by those who control them to those who want them. In a housing transaction, the seller or landlord sets the terms but then is obligated to whoever meets those terms regardless of race, color, religion, sex or national origin.

In charging that affirmative advertising, housing services, real estate education programs, community relations activities, and housing code enforcement are in violation of Title VIII, opponents of affirmative marketing

¹⁹⁵ *Id.*

¹⁹⁶ The Northern Illinois Planning Commission has published planning aids for municipalities which describe the structure and functions of community relations commissions. NORTHEASTERN ILLINOIS PLANNING COMMISSION, FAIR HOUSING ORDINANCES: A GUIDE FOR LOCAL OFFICIALS (1981).

need to show that the prohibitions of section 3604 apply to municipalities. They must show that the affirmative marketing activity makes unavailable or denies a dwelling to someone on account of race; they must also show that in so doing, segregation is perpetuated.

E. *Undergirding the Quality of Life*

Many suburban municipalities, particularly older ones, are working hard to refurbish and renew their physical appearance. They have gotten involved in commercial revitalization, housing rehabilitation and preservation, street rebuilding, refurbishing of run-down public parks and other public facilities, development of senior centers and an array of service programs to improve the quality of life.¹⁹⁷ The Community Development Block Grant (CDBG) program has become a major source of support for local governments, including suburban governments, to prevent housing and community deterioration. In those suburbs showing racial diversity, public programs of revitalization and improvement take on an additional significance in the effort to maintain integration.

The traditional process of white flight that occurs when a neighborhood becomes diverse, or is about to do so, involves deferral of routine home maintenance. White residents who lose confidence in the future of their neighborhoods defer maintenance or repairs to their house in anticipation of investment in another house; then when the old house is sold, it is burdened with defects. That places an unusual, probably surprising, financial burden on the new owner. The playing out of this process in racially changing neighborhoods has accustomed many people to associate blight, loss of housing value, reduction of tax base and reduction of public services with increase of black ownership. Adding to the problem is a reduction of owner-occupancy. Tenant-occupied housing is rarely as well cared for as owner-occupied housing.

In reaction to these tendencies, and in order to protect their community's housing stock and tax base, some municipalities launch housing revitalization programs.¹⁹⁸ Stricter housing code enforcement and point of sale inspection programs are established to protect all owners and buyers of used homes from some of the dangers of hidden deferred maintenance. Commercial revitalization strengthens existing businesses and attracts new ones. Improvement of city services and public facilities, streets and recreation areas makes long-time residents more confident in the future of their neighborhood while assuring new minority residents

¹⁹⁷ For a description of community revitalization in relation to promotion of racial diversity see H. OBERMANN, A GUIDE, *supra* note 26.

¹⁹⁸ An example of the connection between housing and general revitalization and integration maintenance is found in Cleveland Heights, Ohio, which in 1976 adopted a comprehensive program including improved housing code enforcement, maintenance of public lands, commercial property revitalization and an array of other economic development efforts. See Cleveland Heights, Ohio Comprehensive Real Estate Program, Resolution 26-1976 (1976) (as amended Dec. 3, 1979).

that the traditional process of abandonment with the advent of racial diversity will not occur.

Even though community revitalization and housing preservation are strongly supported in most mature communities, these efforts and other measures to improve the quality of life seem to take on a special importance for a municipality committed to remaining integrated. Oak Park, Illinois, guarantees the market value of its single family housing based on compliance with the city's housing code.¹⁹⁹ Cleveland Heights, Ohio, combines a strong code compliance program²⁰⁰ with financial assistance to help low-income owners make repairs that are necessary to meet compliance standards.²⁰¹ Shaker Heights, Ohio, helps support financial assistance and loan programs for housing repairs specifically targeted to interracial neighborhoods.²⁰²

Much of this special community development programming is required for compliance with regulations promulgated and monitored by HUD. Until 1980, regulations specifically required that federal CDBG funds be targeted to low-income and moderate-income households. The requirement of affirmatively furthering fair housing put upon the Secretary of HUD by Title VIII establishes not only the validity but also the necessity that a municipality use its grant to fulfill the purposes of Title VIII including the promotion of integrated residential patterns.

F. *The Metropolitan Alliance*

In the Cleveland, Chicago, Cincinnati, Detroit, Milwaukee, and northern New Jersey metropolitan areas the integration maintenance strategy of interracial suburbs includes support for metropolitan open housing programs.²⁰³ Metropolitan programs provide the community protecting its integrated housing patterns with the means of influencing neighboring jurisdictions that are not in support of open housing or racial diversity.

¹⁹⁹ H. OBERMANN, A GUIDE, *supra* note 26 (from the report on Oak Park, Ill.; Dept. of Community Relations, Oak Park Equity Assurance Program).

²⁰⁰ *Id.* (from the report on Cleveland Heights, Ohio; Comprehensive Real Estate Program).

²⁰¹ *Id.* (from the report on Cleveland Heights, Ohio; Forest Hill Church Housing Corp., Challenge Fund).

²⁰² *Id.* (from the report on Shaker Heights, Ohio; Moreland Community Assoc., Financial Assistance Program).

²⁰³ There are metropolitan fair housing centers in all of these cities: in Cleveland, the Cuyahoga Plan of Ohio; in Chicago, the Leadership Council for Metropolitan Open Communities and the South Suburban Housing Center; in Cincinnati, Housing Opportunities Made Equal; in Milwaukee, the Metropolitan Milwaukee Fair Housing Council; in New Jersey, the Fair Housing Council of Bergen County; in Richmond, Va., Housing Opportunities Made Equal. Fair housing centers are operating in most other major metropolitan areas. Most of the centers concentrate on enforcement activities. Many are affiliated with the National Committee Against Discrimination in Housing, headquartered in Washington, D.C.

Metropolitan fair housing agencies provide several kinds of services on a metropolitan basis that lend aid to the interracial neighborhoods threatened by resegregation. They enforce the laws against racial discrimination in communities where fair housing laws are not otherwise enforced. They inform and educate housing consumers, particularly minority group persons, about locational choices besides those in areas known to be open to minorities. They encourage and aid minority homeseekers exercising their right to rent or buy housing in any location. They research the housing market, government policies and demographic change on an interjurisdictional basis. They educate rental managers, owners and real estate agents in those areas where fair housing laws would otherwise be lightly regarded or ignored.

Alliance with a metropolitan program is particularly important for municipalities in circumstances requiring strong control of segregative real estate practices and affirmative marketing to prevent white flight. Where a municipality is trying to retain white demand, its support of an affirmative effort to increase black demand in the vast majority of neighborhoods where it is lacking demonstrates the integrity of integration maintenance as part of a total fair housing effort. Opponents of affirmative marketing directed only at white homeseekers cannot as easily attack that measure when there is also a balancing effort to support homeseeking by blacks or other minority groups in areas that previously excluded them. In addition to the practical benefits of the metropolitan alliance, those communities seeking to meet a legal requirement to affirmatively further fair housing have legal grounds in Title VIII and its regulatory appendages to extend affirmative marketing efforts to black consumers outside their jurisdictions as well as to their own residents.

V. CONCLUSION

The law now seems to say, in theory at least, that municipalities have a right and a duty to promote integrated housing patterns; yet the law is not specific as to what measures are or are not permissible in pursuit of that objective.²⁰⁴ Statutes do not prescribe specific conduct and courts have generally exhibited restraint regarding what may be done even while asserting that housing integration is a national policy of high priority.

²⁰⁴ 42 U.S.C. § 5301(c)(6) (1976) reads:

The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives.

...
(6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity

Certainly the measures that are most intrusive, those that limit access to a specific dwelling or restrain commercial speech, are subject to the most severe scrutiny. As *Linmark* indicates, they require substantial justifying evidence.²⁰⁵ As *Barrick* indicates, however, they are not categorically impermissible.²⁰⁶ Where panic selling or blockbusting has occurred, and where it can be shown very likely to occur, the techniques with which they are associated — “for sale” signs and direct solicitation of listings — may be curtailed. The method of curtailing this type of commercial conduct must be carefully designed to meet scrutiny tests.

Affirmative marketing measures are not designed to be intrusive. They add a new dimension to the housing market without taking away traditional, even undesirable, real estate marketing practices. The choice-expanding feature is not likely to be challenged. Affirmative marketing that focuses on location, community or neighborhood, seems in any case outside the category of conduct having to do with the sale or rental of a dwelling which is contemplated in the language of Title VIII. Even if a municipally supported affirmative marketing program were found to limit access to a dwelling, the case law suggests that this limitation would be considered a justifiable measure to assure integrated housing.²⁰⁷ As seen in *Barrick* and *Otero*, some denial of housing opportunity may be tolerated in favor of the promotion of integrated residential patterns where trends toward segregation are strong.

Those real estate organizations opposing public support of integration, and public officials seeking definitive statements on which policies and programs are legally permissible and which are not, are very likely to be disappointed. It would be very convenient to know that there are certain integration maintenance measures that will work in any situation no matter what the circumstances. It would appear, however, that courts

and vitality of neighborhoods through the spatial concentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods

Id.

See also *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) where the court stated: “Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.” *Id.* at 821.

²⁰⁵ *Linmark Assocs., Inc. v. Township of Willingboro*, 535 F.2d 786 (3d Cir. 1976), *rev'd*, 431 U.S. 85 (1977).

²⁰⁶ *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974).

²⁰⁷ This is the most clearly apparent in the Second Circuit decision in *Otero v. New York Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973). There the court found that HUD has an affirmative duty to achieve and maintain integrated housing, and the New York Housing Authority as a recipient of HUD funds shares that duty. Municipal governments or other units of government that receive HUD funds would, under the *Otero* doctrine and provisions of the Federal Fair Housing Act, 42 U.S.C. § 3608 (1976), acquire an affirmative duty to prevent ghettoizing and to encourage permanent, integrated housing patterns.

cannot spell out in categorical terms what is or is not permissible.²⁰⁸ The law and federal court opinions seem to direct attention to the circumstances and the effects of public policy and the extent of intrusion which is justifiable in order to meet the objective of integrated residential patterns.

The answer to the question of what race-conscious measures by municipal governments are valid to maintain residential integration would therefore seem to depend on the specific circumstances of the municipality in which the question is asked. The courts that have come closest to the question seem inclined to say that a community interest in maintenance of integrated housing has priority over individual rights of consumers or providers where the exercise of those rights would result in perpetuating segregated housing.

²⁰⁸ [W]hen the Court's formula of the day is left to the chance of who writes a particular opinion, or it is so phrased as to invite erratic interpretation, the effect is unsettling on the lower courts, on practitioners advising clients, on teachers presenting "the law" to their students, and above all, on persons and groups in the society whose rights are at stake.

This uncomfortable realization leaves us with Professor Tribe's rumination in face of the *Bakke* decision: better chaos and uncertainty that doesn't do too much harm than consistent and principled decision-making which reaches an undesirable result (leaving it to each reader to supply his or her definition of "undesirable").

Broderick, *supra* note 110, at 352-53.

